DOCKET

SUPREME COURT
OF THE UNITED STATES

No.	10-114
Title	Ricky D. Fox, Petitioner v. Judy Ann Vice, as Executrix of the Estate of Billy Ray Vice, et al.
Docketed	July 22, 2010
Lower Ct.	United States Court of Appeals for the Fifth Circuit
Case Nos.	(08-31135)
Decision Date	January 19, 2010
Rehearing Denied	April 16, 2010
Questions Presented	

---Date---	--------Proceedings and Orders----------
Jul 15 2010	Petition for a writ of certiorari filed. (Response due August 23, 2010)
Aug 18 2010	Order extending time to file response to petition to and including September 22, 2010, for all respondents.
Aug 27 2010	Brief of respondents Billy Ray Vice, and the Town of Vinton in opposition filed.
Sep 7 2010	Reply of petitioner Ricky D. Fox filed.
Oct 6 2010	DISTRIBUTED for Conference of October 29, 2010.
Nov 1 2010	Petition GRANTED.
Nov 23 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 23, 2010.
Nov 23 2010	The time to file respondents' brief on the merits is extended to and including January 31, 2011.
Dec 23 2010	SET FOR ARGUMENT ON Tuesday, March 22, 2011.
Dec 23 2010	Joint appendix filed. Statement of costs filed.
Dec 23 2010	Brief of petitioner Ricky D. Fox filed.
Dec 23 2010	Supplemental joint appendix filed.
Dec 29 2010	Brief amici curiae of American Civil Liberties Union, et al. filed.
Dec 30 2010	Brief amici curiae of Liberty Institute, et al. filed.
Jan 14 2011	CIRCULATED.
Jan 31 2011	Brief of respondents Billy Ray Vice, Chief of Police for the Town of Vinton, et al. filed. (Distributed)
Feb 7 2011	Brief amici curiae of Arkansas, et al. filed. (Distributed)
Feb 7 2011	Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed)
Feb 11 2011	Record received from U.S.C.A. for Fifth Circuit. (1 envelope)

Feb 17 2011	Record received from U.S.D.C. for Western District of Louisiana. (1 box)
Mar 2 2011	Reply of petitioner Ricky D. Fox filed. (Distributed)
Mar 11 2011	Motion to substitute Judy Ann Vice, as Executrix of the Estate of Billy Ray Vice as respondent in place of Billy Ray Vice filed by respondents and Judy Ann Vice.
Mar 11 2011	Letter brief of petitioner Ricky D. Fox filed. (Distributed)
Mar 11 2011	Letter brief of respondents Billy Ray Vice, Chief of Police for the Town of Vinton, et al. filed. (Distributed)
Mar 11 2011	Motion DISTRIBUTED for Conference of March 18, 2011.
Mar 18 2011	Motion to substitute Judy Ann Vice, as Executrix of the Estate of Billy Ray Vice as respondent in place of Billy Ray Vice GRANTED.
Mar 22 2011	Argued. For petitioner: E. Joshua Rosenkranz, New York, N.Y. For respondents: Mark T. Stancil, Washington, D.C.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
AUG 27 2010
OFFICE OF THE CLERK

(2)

No. 10-114

In the
Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton; TROY CARY, Policeman for the Town of Vinton; TOWN OF VINTON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A district court, in its discretion, may allow a prevailing party a reasonable attorney's fee as part of its costs. 42 U.S.C. § 1988. A defendant may be considered a prevailing party entitled to attorney fees from a plaintiff if a district court finds that the plaintiff's claim was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Petitioner, Ricky D. Fox, filed a lawsuit asserting various federal claims under 42 U.S.C. § 1983. Subsequent to Respondents' filing of dispositive motions, Petitioner raised "last minute" state law claims. The district court dismissed all of the federal civil rights claims and remanded the state tort law claims to state court. A motion for attorney fees was filed by Respondents. In response to the motion, the district court performed the Lodestar analysis and further performed an assessment of the twelve factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974) and awarded respondents' attorney's fees under 42 U.S.C. § 1988.

1. Whether the Fifth Circuit Court of Appeal properly determined that the district court was correct in using the Lodestar analysis and the *Johnson* factors to award attorney's fees to Respondents?

2. More particularly, whether the Fifth Circuit Court of Appeal properly determined that the district court correctly assessed the *Johnson* factors and concluded that *Johnson* factor number Eight ("the amount involved and results obtained") did not require a downward

adjustment to the Lodestar amount regarding state law claims which were raised "at the last minute" and then remanded to state court.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 4

MISSTATEMENT OF FACTS 6

REASONS FOR DENYING THE PETITION . . . 10

I. The Fifth Circuit Properly Applied Precedent In Affirming The District Court's Award Of Attorney Fees. 11

II. There Exists No Circuit Split Regarding Attorney Fee Awards To Prevailing Defendants. 17

III. Denying Attorney Fees To Respondents Would Lead To Absurd Results. 22

CONCLUSION 25

APPENDIX

Appendix A — Petition for Damages, State of Louisiana 14th Judicial District Court (December 20, 2005) 1b

TABLE OF AUTHORITIES

CASES

Christiansburg Garment Co. v. EEOC,
434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978) ..... *passim*

Colombrito v. Kelly,
764 F.2d 122 (2d Cir. 1985) 17, 18

Curry v. A.H. Robins Co.,
775 F.2d 212 (7th Cir. 1985) 20, 21

Grubbs v. Butz,
179 U.S. App. D.C. 18, 548 F.2d 973 (D.C. Cir. 1976) 13

Hensley v. Eckerhart,
461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) ..... *passim*

Hughes v. Rowe,
449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980) 10, 11, 12, 18, 19

Johnson v. Georgia Highway Express, Inc.,
488 F.2d 714 (5th Cir. 1974) ..... *passim*

Lotz Realty Co., Inc. v. U.S. Dep't of Housing and Urban Dev.,
717 F.2d 929 (4th Cir. 1983) 17, 18

Quintana v. Jenne,
414 F.3d 1306 (11th Cir. 2005) 19, 20, 23

Tutor-Saliba Corp. v. City of Hailey,
542 F.3d 1055 (9th Cir. 2006) 19, 24

Ward v. Hickey,
996 F.2d 448 (1st Cir. 1993) 18, 19

STATUTES

28 U.S.C. § 1367(c) 1

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... *passim*

RULES

Fed. R. Civ. P. 8 1

Fed. R. Civ. P. 54 ..... 2, 3

Sup. Ct. R. 10(a) 17

Sup. Ct. R. 15.2 6

INTRODUCTION

Petitioner, Ricky D. Fox, filed an original Complaint asserting civil rights claims against Respondents pursuant to 42 U.S.C. § 1983 alleging that Petitioner was the target of an "anonymous" letter as well as a "staged incident" with a third party whereby Petitioner was accused of making racial comments. Throughout the course of the proceedings, Respondents recognized Petitioner's suit as only setting forth federal claims. Respondents filed dispositive motions seeking dismissal of all federal claims asserted against them. Respondents did not make any arguments regarding state law claims within their dispositive motions because Respondents were not aware that the Petitioner was asserting any state law claims in his Complaint. In response, Petitioner filed an Opposition Memorandum to the dispositive motions acknowledging and admitting that Petitioner had no valid federal claims pursuant to 42 U.S.C. § 1983, however, Petitioner set forth in his Opposition Memorandum that he was now expressly setting forth state tort law claims for intentional infliction of emotional distress, defamation and extortion. Further, Petitioner asked the district court to remand the state law claims to state court. Respondents were surprised by Petitioner's revelation that he was now asserting state law claims. In response, Respondents requested that the district court ignore the state law claims pursuant to Rule 8 of the Federal Rules of Civil Procedure since the Petitioner's complaint did not place Respondents on notice of said state law claims. Ultimately, the district court issued a judgment dismissing all federal claims but declined to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c).

In declining to exercise jurisdiction over the pendent state law claims, the district court observed that "the court has had minimal involvement with the state law claims at this stage." Pet. App. 40a.

Respondents filed a Motion for Attorneys' Fees and Costs pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 54. In response, the district court determined that under the standard set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978), the Petitioner's federal claims were frivolous, unreasonable, or without foundation. The district court further performed a Lodestar analysis as well as an evaluation of the twelve *Johnson* factors to determine whether to adjust the Lodestar amount upward or downward. The district court specifically addressed *Johnson* factor number Eight regarding "the amount involved and the results obtained" and addressed it with the recognition that the state law tort claims were remanded to state court without consideration by the district court. The district court evaluated the facts and circumstances with this peculiar sequence of events in which the state law tort claims were not raised until the eve of the federal claims being dismissed. The district court ultimately concluded that the Lodestar amount should not be reduced based upon the following findings of fact:

> The Court finds that plaintiff failed to allege state tort law violations in the Complaint such that defendants were adequately noticed that a separate defense as to these claims would need to be prepared at the beginning of the litigation. Furthermore, the Record reflects that, throughout the litigation, the focus of both

> plaintiff and defendants was plaintiff's § 1983 claim. Finally, the Court notes defendants' request for attorney's fees relates only to the proceedings before this Court. Defendants do not appear to request attorney's fees related to the defense of the state law claims remanded for a decision to Louisiana state court. In consideration of these points and the *Johnson* factors generally, the Court does not adjust the determined Lodestar amount. Pet. App. 32a-33a.

On appeal, the Fifth Circuit Court of Appeal affirmed the district court's finding that Respondents were "prevailing parties" for purposes of 42 U.S.C. § 1988 and Fed. R. of Civ. P. 54, and that Petitioner's federal claims were frivolous, unreasonable or without foundation. The Fifth Circuit also affirmed the district court's equitable determination of attorney fees pursuant to the Lodestar analysis and application of the *Johnson* factors. In fact, the Fifth Circuit cited to this Court stating "there is no precise rule or formula for making these determinations," and much should be left to the district court's equitable discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 436-37, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). The Fifth Circuit recognized that the district court specifically assessed that the state law tort claims were not raised or addressed while the suit was pending within the district court's jurisdiction. Ultimately, the Fifth Circuit determined that it was not an abuse of discretion for the district court to decline to make a downward adjustment of the Lodestar amount under the facts and circumstances of this particular case. Pet. App. 11a-12a.

A Petition for Rehearing *En Banc* was filed by Petitioner. In response, no member of the panel nor judge in regular active service with the Court requested that the court be polled and thus the Petition was denied. Pet. App. 42a.

STATEMENT OF THE CASE

This is a civil rights action brought by Petitioner, Ricky D. Fox, pursuant to 42 U.S.C. § 1983. Fox set forth in his original petition claims against the prior chief of police, Billy Ray Vice ("Vice"), and two police officers employed with the Town of Vinton ("Vinton"), namely Arthur Phillips ("Phillips") and Troy Cary ("Cary"), as well as claims against Vinton.[1] Subsequently, Petitioner voluntarily dismissed his claims against defendant, Phillips, early in the proceedings.

Petitioner alleged in his Complaint that Vice sent an anonymous letter to Petitioner setting forth disclosure of certain information about Fox if Fox ran for the position of chief of police for the Town of Vinton. Further, the complaint alleged that Vice, Cary and Phillips conspired, directed and orchestrated a confrontation between the Petitioner and a private citizen at a high school basketball game whereby the private citizen accused Petitioner of making racial slurs. Petitioner further alleged that an offense report was prepared at the direction of Vice regarding the complaint made by the private citizen about the

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[1] Petitioner, Ricky D. Fox, won the election for Chief of Police against the incumbent, Billy Ray Vice, and thus Mr. Vice was no longer Chief of Police at the time this suit was filed.

confrontation and that the offense report was shown to third persons.

Petitioner set forth only federal civil rights claims pursuant to 42 U.S.C. § 1983. Petitioner alleged that Vice, Phillips, and Cary violated Petitioner's constitutional rights by the power conferred upon them as policemen of the Town of Vinton. Ultimately, plaintiff alleged that his rights, privileges and immunities afforded by the Constitution were violated as follows:

A. The right to seek public office;
B. The right to be free from extortion;
C. The right to be protected by unlawful interference by police;
D. The right to be protected by malicious abuse of process;
E. The right to not be slandered/defamed;
F. The right to due process;
G. The right to not be subject to abuse of power;
H. Other violations to be proven at the trial of this matter.

App. 1a

Petitioner alleged that Vinton was vicariously liable for the acts of its employees, Vice, Phillips and Cary. Petitioner sought general damages, punitive damages as well as attorney fees in regard to his civil rights claims brought pursuant to 42 U.S.C. § 1983.

This matter proceeded in the federal court and throughout the course of the proceedings, Respondents recognized the suit as setting forth federal claims only, and thus defended the case accordingly. The Record

confirms that Respondents only recognized Petitioner as asserting federal civil rights claims by the mere fact that Respondents' dispositive motions sought dismissal of this case by challenging the federal civil rights claims. Respondents' dispositive motions did not challenge any state tort law claims because Respondents were not placed on notice that Petitioner was asserting state tort law claims. It was not until Petitioner was challenged through the dispositive motions that Petitioner conveniently raised that he was pursuing state tort law claims for intentional infliction of emotional distress, defamation and extortion.

Thus, it is under these particular facts and circumstances set forth above that the district court determined that Respondents were prevailing parties, that Petitioner's federal civil rights claims were frivolous, unreasonable or without foundation; and that pursuant to the *Johnson* factors, the amount determined under the Lodestar analysis did not require a downward adjustment regarding the state tort law claims which were remanded to state court.

MISSTATEMENT OF FACTS

Pursuant to Supreme Court Rule 15.2, the Respondents should address any perceived misstatement of fact or law found in the Petition. Thus, Respondents submit the following misstatements of fact contained in the Petition.

Throughout the Petition, Fox describes his suit as alleging state law claims (plural) as well as a federal claim (singular) in an attempt to sidestep one of the critical factors that was considered by the district

court in determining an award of attorney fees. As set forth above, Petitioner's original complaint set forth and gave notice of only multiple federal civil rights claims. The state tort law claims were only expressly raised in Petitioner's Opposition to Respondent's dispositive motions.

Petitioner makes issue that Vice was found guilty of extortion in the state criminal court proceedings. However, the conviction was subject to appeal at the time of this civil proceeding. Further, Petitioner's civil case set forth additional allegations against Vice and other defendants that they pursued these alleged actions while acting under color of law which would not have been addressed at the criminal proceedings. For example, Petitioner alleged that Vice prepared the anonymous letter at the police station using police equipment. However, Respondents learned through discovery that Petitioner had no information or evidence whatsoever that the alleged anonymous letter was prepared through use of police equipment at the police station.

Petitioner states that he only conceded having no federal claims after completion of discovery. However, Petitioner's concession only occurred in response to the filing of Respondents' dispositive motions which occurred within two months of trial. Further, much of the facts learned through discovery revealed that Petitioner's allegations attempting to show defendants as acting under color of law, were not supported by any evidence that Petitioner alleged he possessed.

Petitioner has described throughout his petition the remanded state tort law claims as "non-frivolous" as well as "valid." However, there has been no judicial

determination regarding the state tort law claims as being valid or non-frivolous. At the request of Petitioner, those state tort law claims were remanded to state court shortly after they were raised.

Petitioner states that the Fifth Circuit Court of Appeal affirmed the district court's award of attorney fees "finding that only Mr. Fox's federal claims were frivolous and affirming the remand of the state law claims rather than assessing their obvious merit." Pet. Brief, p. 3. However, the district court's decision to remand the state law claims was not taken up on appeal and thus, there was no judicial determination by the Court of Appeal regarding the remand of the state law claims nor the validity of the state law claims.

Petitioner places emphasis regarding the Ruling by the district court on the dispositive motions whereby the district court stated that any trial preparation, legal research or discovery could be used by the parties in a state court proceeding. However, this was not a judicial finding by the district court, but was merely a comment that any work, although performed while the proceedings were in federal jurisdiction, would not be prevented from being used in any state court proceeding. Additionally, the district court specifically recognized that it had minimal involvement with the state law claims at the time of remand to state court. Pet. App. 40a.

Petitioner states that he voluntarily withdrew his federal civil rights claims. However, the Record revealed that Petitioner only conceded the lack of legal merit in his federal civil rights claims in response to dispositive motions filed by Respondents. The Fifth

Circuit Court of Appeal determined that based upon a review of the Record, Petitioner allowed the case to proceed for more than eighteen months in federal court and through discovery. It was only at the point that he was challenged on those federal claims that Petitioner conceded they were without merit. Further, the Fifth Circuit Court of Appeal recognized that without decisive action by Respondents, Petitioner's baseless federal claims would have proceeded to trial. Pet. App. 6a-7a.

Petitioner represents that the district court made no analysis as to what portion of the attorney fees incurred by Respondents were in defense of Petitioner's federal claims as opposed to the remanded state tort law claims. Pet. Brief, p. 3. However, the district court specifically addressed this circumstance whereby at the time all federal civil rights claims were dismissed, the state tort law claims were not adjudicated but remanded to state court. The district court specifically assessed this factor in awarding attorney fees by performing the Lodestar analysis including an assessment of the twelve *Johnson* factors and specifically *Johnson* factor number Eight regarding "the amount involved and the results obtained." As set forth above by citation from the district court's Memorandum Ruling, the district court determined that Petitioner failed to allege state tort law claims in the complaint in such a manner that Respondents were adequately noticed and that a review of the Record reflected that throughout the litigation, the focus of all parties was Petitioner's federal civil rights claims.

REASONS FOR DENYING THE PETITION

This case involves a request to review a district court's award of attorney fees pursuant to § 1988. This Court has specifically cloaked the district court as the proper adjudicator to make equitable adjustments to an award of attorney fees. This Court has held that the district court necessarily has the discretion in making this equitable judgment *Hensley, supra*. In this instance, the district court properly performed the analysis determining the Lodestar amount and considered the twelve *Johnson* factors and determined within this district court's discretion that a downward adjustment was not required under these particular facts and circumstances. Thus, the Petition asks this Court to review the factual findings by the district court in declining to make a downward adjustment of the Lodestar amount and find it in error. Such a request to review perceived erroneous factual findings is not a compelling reason for this Court's consideration.

In an attempt to have this Petition granted, Petitioner seeks to create a conflict between the circuit courts of appeal and this Court. However, these circuit courts have simply applied the precedent set forth by this Court in *Christiansburg, Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) and *Hensley* to the facts presented before them. Any differing results regarding the amount of the attorney fee and whether there should be an upward or downward adjustment to the attorney fee will certainly occur merely as a result of the particular set of facts and circumstances presented to the district court.

The Petitioner also seeks to create the illusion of a split among the circuit courts of appeal. In reality, the cases cited by Petitioner merely arrive at differing outcomes based upon the particular set of facts and circumstances of that case. Respondents submit that the standards set forth by this Court in awarding attorney fees to a prevailing party under § 1988 have been properly applied by each of the circuits in determining whether the district court has abused its discretion in awarding attorney fees. The outcome of each case will certainly differ based upon the district court's duty to be the proper adjudicator regarding equitable adjustments to attorney fees. This is particularly true given there is no precise rule or formula for making these determinations. *Hensley*, 461 U.S. at 436-37.

I. The Fifth Circuit Properly Applied Precedent In Affirming The District Court's Award Of Attorney Fees.

The Fifth Circuit properly applied established law in finding that the district court did not abuse its discretion in finding Petitioner's federal claims frivolous and in awarding attorney fees to Respondents. The Fifth Circuit analyzed the § 1988 attorney fee award under the precedent set forth by this Court in *Christiansburg*, *Hughes*, and *Hensley*.

In *Christiansburg*, this Court determined that a prevailing defendant is entitled to attorney fees in a Title VII case. This Court held that a district court may in its discretion award attorney's fees to a prevailing defendant upon a finding that the plaintiff's claims were frivolous, unreasonable, or without foundation, even though not brought in subjective bad

faith[5] *Christiansburg*, 434 U.S. at 421. In holding this standard, this Court reviewed the policy considerations in permitting district courts to award attorney fees to prevailing defendants. "A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting § 706(k), Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith." *Id.* at 419. This Court also relied upon the legislative history of the Senate Floor Discussion of the attorney's fee provision of Title II. Several senators explained that an allowance of attorney fee awards to defendants would serve "to deter the bringing of lawsuits without foundation," "to discourage frivolous suits," and "to diminish the likelihood of unjustified suits being brought." *Id.* at 420. This Court provided its overall observations from the legislative history as follows:

> If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis. The Court of Appeals for the District of Columbia Circuit seems to have drawn the maximum significance from the Senate debates when it concluded: "[From these

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[5] The same standard is applicable to Section 1988 claims for attorney fees. *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

> debates] two purposes for § 706(k) emerge. First, Congress desired to 'make it easier for a plaintiff of limited means to bring a meritorious suit'...But second, and equally important, Congress intended to 'deter the bringing of lawsuits without foundation' by providing that the 'prevailing party' - be it plaintiff or defendant - could obtain legal fees." *Grubbs v. Butz*, 179 U.S. App. D.C. 18, 20, 548 F. 2d 973, 975.

Additional precedent is provided by this Court in *Hensley v. Eckerhart*. This Court determined that district courts could award attorney fees to partially prevailing parties and held that the amount of the fee to be awarded to the partially prevailing party would be left to the discretion of the district court to make an equitable judgment. 461 U.S. at 436-37. This Court recognized that the amount of any fee awarded, "of course, must be determined on the facts of each case." *Id.* at 429. This Court further provided guidance to the district courts to apply the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), relying upon the Senate report citing to the *Johnson* factors. *Hensley*, 461 U.S. at 429-30. Additionally, this Court placed particular importance on *Johnson* factor number Eight, "the amount involved and the results obtained." *Hensley*, 461 U.S. at 430. The "product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Id.* at 434. This Court rejected an abstract "mathematical approach comparing the total number of issues in the case with those actually prevailed

upon. Such a ratio provides little aid in determining what is a reasonable fee in light of all of the relevant factors." *Id.* at 435 n.11. This Court determined that it would not provide a precise, bright line rule for awarding fees to partially prevailing parties, but emphasized that the district court, through its discretion, could consider all factors in determining an equitable amount:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified....
>
> We re-emphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award... *Hensley*, 461 U.S. at 436-37.

In determining whether Respondents were entitled to attorney fees under § 1988, the Fifth Circuit properly applied this Court's precedent as set forth in *Christiansburg* and determined that Petitioner's federal civil rights claims were frivolous, unreasonable or without foundation. The Fifth Circuit

acknowledged that courts must resist the understandable temptation to engage in *post hac* reasoning, but must instead ask whether the case is so lacking in arguable merit as to be groundless or without foundation. Pet. App. 7a-8a.

In the present matter, the Fifth Circuit determined that Petitioner failed to establish any prima facie case on its federal claims finding that the dismissal of Petitioner's federal constitutional claims was not based on evidentiary hurdles faced at the end of discovery but rather Petitioner's claims were groundless because "the offenses as alleged in his complaint have no redress in the Constitution or laws of the United States." Pet. App. 8a. The Fifth Circuit determined that the anonymous nature of the letter received by Fox and the lack of constitutionally-protected harm stemming from the alleged false police report were circumstances of which Petitioner was aware of from the outset of litigation and thus no evidence produced in the discovery process could change the underlying deficiencies in Petitioner's Complaint. Pet. App. 8a. The Fifth Circuit further confirmed that any settlement talk was one sided as only being asserted by Petitioner and further found that Petitioner's federal claims were all dismissed without trial. Thus, the Fifth Circuit properly applied precedent and determined that Respondents were entitled to attorney fees as prevailing defendants based upon Petitioner's claims being frivolous, unreasonable or without foundation.

The Fifth Circuit also correctly applied the precedent of this Court as set forth in *Hensley* by determining that a partially prevailing defendant is entitled to attorney fees which can be traced to a

plaintiff's frivolous claims. The Fifth Circuit recognized this Court's statement that "there is no precise rule or formula for making these determinations and much should be left to the district court's equitable discretion." In applying this Court's precedent in *Hensley*, the Fifth Circuit observed that the district court performed the necessary analysis required by *Hensley*:

> In its Order awarding Appellee's attorney's fees, the district court noted that "the focus of both plaintiff and defendants was plaintiff's § 1983 claim." The Court also noted in the second Order that "defendant's [sic] request for attorney's fees relate only to proceedings before this Court." Finally, the Court noted that "defendant's [sic] did not appear to request attorney's fees related to the defense of the state law claims remanded for decision to the Louisiana state court." Pet. App. 8a.

Ultimately, the Fifth Circuit determined that since the district court specifically restricted its award of attorney fees to the proceedings before it and because the Court found that Respondents did not seek attorney's fees for the defense of the state law claims, the district court's award of attorney fees was not an abuse of discretion. Pet. App. 12a.

The Fifth Circuit clearly applied the precedent of this Court as set forth in *Christiansburg* and *Hensley* in affirming the district court's award of attorney fees to Respondents and thus Petitioner's representation of a conflict with this Court's precedent is without merit.

II. There Exists No Circuit Split Regarding Attorney Fee Awards To Prevailing Defendants.

Petitioner attempts to create a circuit split where none exists in order to comply with Supreme Court Rule 10(a). Petitioner cites to cases from various circuit courts and mischaracterizes their decisions as being conflicted in law. In truth, the differing outcomes by the circuits is, not surprisingly, a result of the particular and distinct set of facts posed to that circuit court. In fact, some of the decisions cited by Petitioner as "adopting differing rules" did not even address a determination of whether an amount of attorney fees was properly awarded to a partially prevailing defendant.

The two cases cited by Petitioner that do not even address a determination of the amount of attorney fees, much less adopt new rules for determining attorney fees, are *Colombrito v. Kelly*, 764 F.2d 122 (2d Cir. 1985) and *Lotz Realty Company, Inc. v. U.S. Department of Housing and Urban Development*, 717 F.2d 929 (4th Cir. 1983).

In *Colombrito*, the Second Circuit addressed the question of whether the district judge erred in finding plaintiff's claims to be frivolous. Upon review, the Second Circuit determined that the plaintiff's § 1985 claims could not be judged groundless and the plaintiff's § 1983 claims had at least a colorable basis for an inference of collusion. The Second Circuit concluded the case by determining that "on the whole, *Colombrito's* suit cannot be considered groundless, frivolous or meritless" relying upon the assessment that the case involved complex issues and involved

"new and changing principles of constitutional law." *Colombrito*, 764 F.2d at 132. Thus, the Second Circuit never addressed the issue of a partially prevailing party.

The same situation occurred with the Fourth Circuit in *Lotz Realty Company, Inc.* The district court had denied the defendant's motion for attorney fees under § 1988. On appeal, the Fourth Circuit determined that the defendant was a prevailing party in all aspects of the case. Based on that determination, the Fourth Circuit simply remanded the case to the district court to determine whether plaintiff's claims were frivolous, unreasonable or without foundation under *Christiansburg*. Thus, the Fourth Circuit did not make any determinations beyond finding the defendant as a prevailing party and properly remanding the matter to the district court.

Upon review of the remaining circuit cases cited by Petitioner as allegedly adopting differing rules for awarding fees to partially prevailing parties, such "rule making" does not exist. These cases simply examine the distinct set of facts before them and upon application of the precedent provided by this Court in *Christiansburg*, *Hughes* and *Hensley*, they reach differing results based on the facts and not on an alleged creation of "new rules."

In *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the First Circuit merely addressed the error by the district court who simply denied the motion for attorney fees without making any determinations of whether plaintiff's claims were frivolous or not. The district court observed that plaintiff's claims were interrelated and simply shut down its analysis at that point and

failed to determine if any of the claims were frivolous under *Christiansburg* and *Hughes*. The First Circuit determined that the district court could not deny the motion for attorney fees prematurely on that basis and subtly chastised the district court that it "should not deny fees for defending frivolous claims merely because calculation would be difficult." *Ward*, 996 F.2d at 455-56. The First Circuit remanded the matter to the district court for further determinations since the district court never addressed whether plaintiff's claims were frivolous.

Petitioner also misinterprets the cases of *Tutor-Saliba Corp. v. City of Hailey*, 542 F.3d 1055 (9th Cir. 2006) and *Quintana v. Jenne*, 414 F.3d 1306 (11th Cir. 2005) as setting forth a "new rule" that attorney fees are only awarded when plaintiff's claims are distinct. In reality, both cases addressed facts in which the plaintiff's claims happened to be distinct.

In *Tutor Saliba Corp.*, the Ninth Circuit affirmed the district court's finding that the plaintiff's constitutional claims were frivolous but that the federal statutory claims under the Airport and Airway Improvement Act and Airport Noise and Capacity Act were issues of first impression and therefore not frivolous. The Ninth Circuit further observed that the district court had evaluated the defense to the frivolous federal constitutional claims and the defense to the federal statutory claims and the district court subsequently performed a computation of attorney fees based on those circumstances. The Ninth Circuit determined that the district court had properly performed the analysis and justified its computation by its concise and clear explanation for awarding fees in this manner under these distinct facts. At no time

did the Ninth Circuit declare any "new rule" that attorney fees can only be awarded if the claims are distinct.

In *Quintana*, the Eleventh Circuit reversed the district court's finding regarding the issue of frivolousness. The district court had determined both federal claims to be frivolous. On appeal, the Eleventh Circuit reversed the finding of frivolousness as to one of the claims. Thus, the Eleventh Circuit remanded the case to the district court to recompute attorney fees. The Eleventh Circuit simply observed that the case involved a common set of facts with distinguished claims and was "confident that the district court will be able properly to weigh and assess the amount of attorney's fees" attributable to defending the frivolous retaliation claim. *Quintana*, 414 F.3d at 1312. Again, there exists no creation of new law or rules in this case and certainly there is no holding by this Court that partially prevailing parties are only entitled to attorney fees for cases involving distinct claims. This is just another example of a circuit court reviewing a case on its distinct set of facts and circumstances.

The case of *Curry v. A.H. Robins Co.*, 775 F.2d 212 (7th Cir. 1985), is yet another case involving distinct facts and an appellate court's review of whether the district court abused its discretion in awarding attorney fees under § 1988. This case involved peculiar facts. The plaintiff set forth three counts involving the product, the Dalcon Shield, which included a class action on behalf of users in the United States and in certain third world countries. Ultimately, Counts One and Two were dismissed by the district court as being barred by the relevant statute of limitations. Count Three was later

dismissed and found to be frivolous and the district court awarded attorney fees. The Seventh Circuit began its review by observing that "we further note that attorney's fee awards under 42 U.S.C. § 1988 rests within the sound discretion of the trial court. And this court will not disturb an award of attorney's fees under § 1988 unless the district court abused its discretion." *Curry*, 775 F.2d at 219. (Citations omitted). The Seventh Circuit determined that the district court did not abuse its discretion in awarding attorney fees. This case reviewed the precedent requiring a district court to consider certain factors in awarding attorney fees including whether a significant issue has been resolved in a party's favor, but the Seventh Circuit certainly does not set forth any holding that a prevailing party is entitled to attorney fees *only* where the frivolous claim is a significant issue. Respondents once again show that this case simply followed precedent and affirmed the attorney fee award based on the distinct facts and circumstances before it and found no abuse of discretion.

The review of the present case by the Fifth Circuit is just another example of an outcome based upon a distinct set of facts and circumstances. The Fifth Circuit properly applied this Court's precedent as well as this Court's instruction that determinations of attorney fees "should be left to the district court's equitable discretion" and ultimately determined that under the facts and circumstances before the district court, the district court did not abuse its discretion in awarding attorney fees. In this instance, the Fifth Circuit observed that the district court assessed that the plaintiff pursued only federal claims with the district court and that state law claims were not raised

until the eve of the federal claims being dismissed and the district court appropriately restricted its award of attorney fees to the proceeding before it. Pet. App. 12a. The district court provided a concise and clear explanation of its reasons for declining to make a downward adjustment to the Lodestar amount for which no abuse of discretion existed.

As shown above, the cases among the various circuits involved review of distinct sets of facts and circumstances and all circuit courts properly applied this Court's precedent in reviewing whether the district court abused its discretion in awarding attorney fees. Despite Petitioner's attempts to create conflicts of "rules" allegedly created by the circuits, there exists no such creation of "rules" nor conflict between the circuits.

III. Denying Attorney Fees To Respondents Would Lead To Absurd Results.

Respondents submit that a reversal of the district court's discretionary equitable decision to decline to make a downward adjustment of the attorney fee award under these particular circumstances would lead to absurd results. Petitioner filed this suit asserting civil rights claims under 42 U.S.C. § 1983. "In any action or proceeding to enforce" such a provision, "a Court in its discretion may allow the prevailing party... a reasonable attorney's fee." 42 U.S.C. § 1988. All of Petitioner's federal civil rights claims were determined frivolous. Only last minute state tort law claims raised on the eve of Petitioner's federal claims being dismissed remained, which were then remanded to state court. It is admitted that an award of attorney's fees to defendants requires a

higher standard showing that the civil rights claims were frivolous:

> On the other hand, frivolous civil rights claims waste judicial resources that would otherwise be used for legitimate claims. Accordingly, a district court should not deny fees for defending frivolous claims merely because calculation would be difficult...it would undermine the intent of Congress to allow plaintiff to prosecute frivolous claims without consequences merely because those claims were joined with unsuccessful claims that were not frivolous. *Quintana*, 414 F.3d at 1312.

In such instances involving petitioners bringing frivolous federal civil rights claims with claims that may be considered non-frivolous or claims which may not be addressed by the court (such as remanded state law claims), protection is provided through the district court's discretion to review the record and award attorney fees through the Lodestar analysis and an upward or downward adjustment following a *Johnson* factor assessment, particularly *Johnson* factor number Eight.[3]

---

[3] "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and a desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 436-37.

In this matter, the district court performed such an analysis and specifically addressed the fact that the state law claims were not raised until the eve of the dismissal of the federal claims. In the district court's discretion, it was determined that no downward adjustment was needed under the *Johnson* factors. Respondents submit that a decision to the contrary would only serve to open up the litigious gates and permit plaintiffs to pursue frivolous civil rights claims and avoid an assessment of attorney fees by simply bootstrapping a state tort law claim to its suit. Allowing such a rule "would depend not upon the district court's review of the merits of a plaintiff's § 1983 claims, but upon how a plaintiff chose to draft his complaint." *Tutor-Saliba Corp.*, 542 F 3d at 1064. An even more absurd result would occur if a plaintiff is permitted to pursue his suit in the same manner as Petitioner whereby state tort law claims were bootstrapped to a suit on the eve of his frivolous federal claims being dismissed.

In summary, the discretion taken by this district court in awarding attorney fees to Respondents under these circumstances was according to precedent and in alignment with the policy considerations expressed by this Court. This was a civil rights suit in which all civil rights claims were found frivolous. Last minute, non-civil rights, state tort law claims did not change that result. A ruling which would permit the Petitioner to avoid the attorney fees awarded to Respondents under these circumstances would only lead to absurd results.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Petition for Damages, State of Louisiana 14th Judicial District Court (December 20, 2005) 1b

APPENDIX A

STATE OF LOUISIANA

14th JUDICIAL DISTRICT COURT

NO. 2005-005932, DIV. B

[Filed December 20, 2005]

PARISH OF CALCASIEU

/s/
DEPUTY CLERK OF COURT

RICKY D. FOX	)
	)
VS.	)
	)
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY and THE TOWN OF VINTON	)

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes RICKY D. FOX (sometimes hereafter referred to as "FOX"), a U.S. citizen of the full age of majority and domiciled in Calcasieu Parish, Louisiana.

1.

The defendants herein are:

A) BILLY RAY VICE, a person of the full age of majority and domiciled in Calcasieu Parish;

B) ARTHUR PHILLIPS, a person of the full age of majority and domiciled in Jefferson County, Texas;

C) TROY CARY, a person of the full age of majority and domiciled in Jefferson Davis Parish;

D) THE TOWN OF VINTON, a duly incorporated municipality.

2.

At all times mentioned herein THE TOWN OF VINTON was a duly incorporated municipality of the State of Louisiana.

3.

At all times relevant herein BILLY RAY VICE was the Chief of Police for THE TOWN OF VINTON.

4.

At all times relevant herein ARTHUR PHILLIPS and TROY CARY were policemen for THE TOWN OF VINTON.

5.

At all times relevant herein, BILLY RAY VICE, ARTHUR PHILLIPS and TROY CARY were acting in the course and scope of their employment with THE TOWN OF VINTON, thereby rendering THE TOWN OF VINTON vicariously liable for their actions as set forth herein.

6.

At all times relevant herein petitioner, RICKY D. FOX, was an announced candidate for the position of Chief of Police for THE TOWN OF VINTON for the election scheduled for April 2, 2005.

7.

At all times relevant herein BILLY RAY VICE was an announced candidate for the position of Chief of Police for THE TOWN OF VINTON for the election scheduled for April 2, 2005.

8.

In or about the month of January, 2005, BILLY RAY VICE sent an anonymous letter to petitioner, RICKY D. FOX, threatening to take certain actions against FOX if FOX ran for the position of Chief of Police for THE TOWN OF VINTON; BILLY RAY VICE authored the letter, printed it at the Police Department and caused it to be mailed to petitioner.

9.

On or about February 7, 2005, ARTHUR PHILLIPS, BILLY RAY VICE and TROY CARY conspired, directed and orchestrated a confrontation between FOX and Joe Budwine, a private citizen of THE TOWN OF VINTON, at a Vinton Highschool basketball game in THE TOWN OF VINTON, whereby Joe Budwine accused petitioner of making a racial slur, i.e., "When I'm elected Chief of Police No N _ _ _ _ _ _ is going to be able to cross the tracks and go shopping in Vinton." After Joe Budwine faked the confrontation at the basketball game, he made numerous statements in the parking lot after the game in which he stated he was going to harm plaintiff and his son (Ben Fox) in the future.

10.

On or about the following Wednesday after the said basketball game, ARTHUR PHILLIPS, while operating a TOWN OF VINTON police car, picked up Joe Budwine and brought him to the police department for purposes of filing a complaint against petitioner for Disturbing the Peace by Racial Slur.

11.

A formal complaint (offense report) of criminal conduct was prepared by TROY CARY under the direction of BILLY RAY VICE.

12.

BILLY RAY VICE caused the said offense report to be shown to third-persons.

13.

The said offense report did not result in formal charges being filed against petitioner because the said BILLY RAY VICE was first arrested by the FBI in connection with his actions as set forth herein.

14.

In the alternative to petitioner's allegations of vicarious liability on the part of THE TOWN OF VINTON, petitioner alleges that THE TOWN OF VINTON, TROY CARY, BILLY RAY VICE and ARTHUR PHILLIPS, are liable under 42 U.S.C.S. § 1983, which protects petitioner's rights, privileges and immunities as secured by our Constitution and laws.

15.

The actions of BILLY RAY VICE, ARTHUR PHILLIPS and TROY CARY as outlined herein are a willful and gross abuse of power, all made possible by the power conferred upon them as policeman for THE TOWN OF VINTON.

16.

The rights, privileges and immunities afforded petitioner by our Constitution and laws that were violated include, but are not limited to the following:

a) the right to seek public office;
b) the right to be free from extortion;
c) the right to be protected by unlawful interference by police;

d) the right to be protected by malicious abuse of process;
e) the right to not be slandered/defamed;
f) the right to Due Process;
g) the right to not be subjected to abuse of power; and
h) other violations to be proven at the trial of this matter.

17.

The said offense report that was prepared against petitioner was totally false in its allegations and was made with malice on the part of BILLY RAY VICE, ARTHUR PHILLIPS and TROY CARY.

18.

Petitioner has suffered and is entitled to recover reasonable sums for the following items of damage as a direct result of the actions of the defendants, as outlined herein, to-wit:

a) violation of petitioner's rights, privileges and immunities as secured by our Constitution and laws;
b) past, present and future emotional distress;
c) past, present and future embarrassment;
d) past, present and future humiliation;
e) past, present and future damage to reputation;
f) punitive damages;
g) reasonable attorney's fees; and
h) other damages to be proven at the trial of this matter.

19.

The damages suffered herein by petitioner are sufficient to legally warrant a jury trial.

WHEREFORE, petitioner, RICKY D. FOX, prays that the defendants, BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY and THE TOWN OF VINTON be served with copies of this Petition and be duly cited to appear and answer same, and, after lapse of legal delays and due proceedings had, there be Judgment herein in favor of the petitioner, RICKY D. FOX, and against the defendants, BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY and THE TOWN OF VINTON, jointly and insolido, for such sums as may be reasonable under the circumstances of this case, together with legal interest thereon from the date of judicial demand, attorney's fees and all costs, including court costs, of these proceedings.

Petitioner further prays that he be granted all further and different relief as the facts, law, and equity of this case require.

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personally at
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1201 Horridge Street
Vinton, LA 70668

ARTHUR PHILLIPS
personally at
The Vinton Police Department
1201 Horridge Street
Vinton, LA 70668

TROY CARY
personally at
The Welsh Police Department
201 S. Elms Street
Welsh, LA 70591

THE TOWN OF VINTON
through the Mayor of Vinton
Mr. David Riggins
Vinton City Hall
1201 Horridge Street
Vinton, LA 70668

REPLY BRIEF

(3)

No. 10-114

Supreme Court, U.S.
FILED
SEP 7 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICKY D. FOX,

Petitioner,

—v.—

BILLY RAY VICE, Chief of Police for the Town of Vinton;
TROY CARY, Policeman for the Town of Vinton;
TOWN OF VINTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PETITIONER'S REPLY 1

I. Respondents Cannot Reconcile The Disparate Results Reached By The Circuits 2

II. Respondents Mischaracterize This Court's Precedent And Fail To Engage The Issue On Which Circuits Are Split 6

III. Respondents Mischaracterize Mr. Fox's Action, Which Is A Strong Vehicle For Certiorari On This Important Issue 9

CONCLUSION 12

TABLE OF AUTHORITIES

FEDERAL CASES

Balmer v. *HCA, Inc.*,
423 F.3d 606 (6th Cir. 2005) 6

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 7, 8, 11

Colombrito v. *Kelly*,
764 F.2d 122 (2d Cir. 1985) 3, 5

Curry v. *A.H. Robins Co.*,
775 F.2d 212 (7th Cir. 1985) 4, 5

Hensley v. *Eckerhart*,
461 U.S. 424 (1983) 3, 7, 8, 9

Lotz Realty Co. v. *HUD*,
717 F.2d 929 (4th Cir. 1983) 3, 4

Quintana v. *Jenne*,
414 F.3d 1306 (11th Cir. 2005) 4, 5, 6

Tutor-Saliba Corp. v. *City of Hailey*,
452 F.3d 1055 (9th Cir. 2006) 3, 4, 5, 6

United States Steel Corp. v. *United States*,
519 F.2d 359 (3rd Cir. 1975) 8

Ward v. *Hickey*,
96 F.2d 448 (1st Cir. 1993) 4, 5

STATE CASES

A. Copeland Enterprises Inc. v. Slidell Memorial Hosp.,
657 So. 2d 1292 (La. 1995) 11

Cox v. W.M. Heroman & Co., Inc.,
298 So. 2d 848 (La. 1974) 10

State v. Vice,
2008 WL 5169955 (La. App. 3d Cir. 2008)..... 10

FEDERAL STATUTES

42 U.S.C. § 1983 ..... 5, 9, 11

42 U.S.C. § 1988 ..... passim

MISCELLANEOUS

H.R. REP. NO. 94-1558 (1976) 8

PETITIONER'S REPLY

In seeking to justify the decision reached by the Court of Appeals, Respondents avoid the circuit split issue presented by Mr. Fox regarding when and whether to award attorney's fees to partially prevailing defendants. Instead, Respondents rely on fragments of the lower court's opinion that bear on different parts of the attorney's fees analysis not relevant to the question presented in this petition. Respondents also attempt, and fail, to show that no split exists on this question, an impossible feat given the disparate results reached by eight circuits on the issue. Respondents' best retort for this deep split, which has been acknowledged by the circuits, is that the attorney's fees analysis turns on its facts, an uncontroversial statement that does not harmonize the split that has formed among the circuits.

Respondents also mischaracterize Mr. Fox's action, claiming that an action that began in state court, makes certain assertions that cannot be federal claims, and is set to be tried in state court did not significantly involve state law claims. This absurd overreaching no doubt stems from Respondents' recognition of the fundamental unfairness that Mr. Fox is faced with as a consequence of the Court of Appeals' decision below. In reality, Mr. Fox, an individual with limited means who has been victimized by the bad acts of Respondents, now finds himself facing a massive legal bill for Section 1988 attorney's fees on top of his own considerable and ongoing legal expenses in prosecuting a meritorious action to remedy the wrongs caused by Respondents. This result is

contrary to congressional design, as expressed in the legislative history of 42 U.S.C. § 1988 and this Court's precedent, both of which emphasize the importance of preserving judicial access for civil rights plaintiffs.

Certiorari should be granted to harmonize the disparate results reached by the circuits on this important question and to redress the harm to Mr. Fox caused by the Court of Appeals' legal errors below.

1. Respondents Cannot Reconcile The Disparate Results Reached By The Circuits.

The circuits are deeply split on whether and under what circumstances a plaintiff may be ordered to pay attorney's fees to a partially prevailing defendant under Section 1988. Pet. at 13-18. Two circuits award attorney's fees for any frivolous Section 1988 claims, even where these claims are interrelated with the plaintiff's non-frivolous claims, while three circuits award attorney's fees only where the plaintiff's frivolous and non-frivolous claims are distinct. Two other circuits award attorney's fees where the plaintiff's frivolous claim is a "significant" issue in the overall litigation, and one circuit awards attorney's fees only where an entire *action* is deemed frivolous. This split will lead to irreconcilable results going forward if certiorari is not granted.

Respondents fail to offer any unifying legal model rationalizing the disparate results reached by the circuits, arguing instead that the circuits' decisions

turn on the underlying facts. Opp. at 17-22. This is an unhelpful observation, as *all* attorney's fees determinations will turn on their facts. Furthermore, Respondents' argument ignores the rules that each circuit has announced in reaching their individual conclusions regarding when attorney's fees awards are appropriate to partially prevailing defendants. It also disregards the fact that other circuits, including the Court of Appeals in this case, have recognized the existence of a circuit split on this issue. *See* Pet. App. at 10a; *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1063-64 (9th Cir. 2006).

Respondents attempt a meritless case-by-case analysis of the various circuits' decisions in an effort to show that they do not address the issue identified by Mr. Fox. For example, Respondents claim that two cases, *Colombrito v. Kelly*, 764 F.2d 122 (2d. Cir. 1985), and *Lotz Realty Co., Inc. v. HUD*, 717 F.2d 929 (4th Cir. 1983), "do not even address a determination of the amount of attorney fees, much less adopt new rules for determining attorney fees." Opp. at 17. Respondents' focus on the determination of the *amount* of fees is misplaced, as the split at issue centers on when and whether it is appropriate to award *any* fees to partially prevailing defendants in the first place. Both *Colombrito* and *Lotz* address this question. In *Colombrito*, the Second Circuit cited this Court's decision in *Hensley* in holding that since the plaintiff's arguably frivolous and non-frivolous claims were "closely intertwined," attorney's fees should not be awarded to the defendant. 764 F.2d at 132. Conversely, in *Lotz*, the Fourth Circuit held that attorney's fees may be

awarded to a partially prevailing defendant where a "significant" issue is resolved in its favor. 717 F.2d at 931.

Respondents' analysis of the remaining cases cited by the petition in support of the circuit split is equally incorrect. As Respondents openly recognize, in *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the First Circuit found that the lower court erred in denying the defendant's request for attorney's fees due to the "interrelatedness" of the plaintiff's frivolous and non-frivolous claims. Opp. at 18-19. This finding is in direct conflict with the holdings of several other circuits, and the fact that the court remanded the case for the district court to make additional findings on the issue of frivolousness does not lessen its significance. Respondents also attempt to distinguish *Curry v. A.H. Robins Co.*, 775 F.2d 212 (7th Cir. 1985), by arguing that it has "peculiar facts." Opp. at 20. Respondents fail to show that *Curry* is "peculiar" for the purposes of the issue presented, given that the case involved two non-frivolous claims dismissed on statute of limitations grounds and a third claim found to be frivolous. The Seventh Circuit affirmed a fee award under these circumstances, finding that "[t]o be a prevailing party under § 1988, a party 'need not prevail on all issues if a significant one is resolved' in its favor.'" *Curry*, 775 F.2d at 219 (internal citations omitted).

Respondents' characterizations of *Quintana v. Jenne*, 414 F.3d 1306 (11th Cir. 2005), and *Tutor-Saliba Corp. v. City of Hailey* fare no better, particularly given that both of these recent cases

explicitly acknowledged the holdings of other circuits in taking a position on this split. Respondents assert that these cases did not establish any "new rule[s]" and "addressed facts in which the plaintiff's claims happened to be distinct." Opp. at 19. This is precisely why these cases matter, since they both involved multi-claim actions where the circuits awarded defendants their fees for frivolous claims because these claims were not interrelated with non-frivolous claims. In *Quintana*, the Eleventh Circuit stated that it was deciding the issue of "whether attorney's fees may be awarded to a defendant in a Title VII action when a frivolous claim is joined with an unsuccessful claim that is not frivolous." 414 F.3d at 1311. The court was "informed and persuaded" by the First Circuit's decision in *Ward* and the Seventh Circuit's decision in *Curry*, and ultimately held that since the plaintiff had distinguished his frivolous claim from his non-frivolous claim, attorney's fees for the frivolous claim would be appropriate. *Id.* at 1312.

Similarly, in *Tutor-Saliba*, the Ninth Circuit recognized that it was resolving "an issue of first impression in [the] circuit" as to "whether attorney's fees may be awarded to a defendant in a § 1983 action when frivolous claims are joined with claims that are not frivolous." 452 F.3d at 1063. The court cited the Second Circuit's decision in *Colombrito* in observing that "[s]ome circuits have concluded that, where a plaintiff's frivolous and non-frivolous claims are sufficiently *intertwined*, the defendant cannot recover attorney's fees for the time spent defending against the frivolous claims." *Id.* It contrasted this position with the First Circuit's decision in *Ward*,

noting that "[o]ther circuits, however, have permitted an award of attorney's fees for defending against frivolous claims even where frivolous and non-frivolous claims are interrelated." *Id.* The court ultimately sided with the Eleventh Circuit's reasoning in *Quintana* in holding that "because [plaintiff's] constitutional claims were sufficiently distinct from his statutory claims, the district court was in a position properly to weigh and assess the amount of fees attributable to [plaintiff's] frivolous claims." *Id.* at 1064.[1]

In short, the circuits themselves have recognized that a patchwork of legal rules has developed on the question of when it is appropriate to award attorney's fees to partially prevailing defendants under Section 1988. These rules will lead to disparate results on this important federal question going forward unless this Court resolves the split.

II. Respondents Mischaracterize This Court's Precedent And Fail To Engage The Issue On Which Circuits Are Split.

Mr. Fox showed in his petition that both Congress and this Court have found that civil rights defendants are in a different position than civil rights plaintiffs for attorney's fees purposes. Pet. at

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[1] Respondents do not challenge Mr. Fox's reading of the Sixth Circuit's decision in *Balmer v. HCA, Inc.*, 423 F.3d 606 (6th Cir. 2005), which held that attorney's fees may never be awarded to defendants where the plaintiff has asserted at least one non-frivolous claim. *Id.* at 616-17.

4-10, 18-23. As a consequence, attorney's fees should be awarded sparingly to civil rights defendants under Section 1988, and not in an action that includes meritorious, interrelated claims along with Section 1988 claims. Such an action is not "frivolous" under this Court's decision in *Christiansburg* and its progeny.

Respondents attempt to sidestep this issue by arguing that the Court of Appeals appropriately applied this Court's precedent in considering the existence of Mr. Fox's interrelated claims in the context of the Lodestar reasonableness analysis for attorney's fees. *See, e.g.*, Opp. at 10, 13, 22-24. This argument does not make good sense, as the question of the amount of attorney's fees awardable to defendants comes only *after* the determination of whether fees should be awarded at all. The fact that the Court of Appeals may have considered (and disregarded) the existence of interrelated claims at the Lodestar stage of its attorney's fees analysis has no bearing on whether it answered the threshold question of whether fees should be awarded at all.

In arguing in support of the Court of Appeals' decision, Respondents also rely on fragments taken from this Court's precedent and the legislative history and claim that they state a policy of protecting civil rights defendants from frivolous lawsuits. Opp. at 11-14. Respondents mischaracterize Congress' emphasis in enacting Section 1988, which was on civil rights *plaintiffs*, not defendants. As this Court stated in *Hensley*, the purpose of Section 1988 was "to ensure 'effective access to the judicial process' for persons with civil

rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. REP. NO. 94-1558, at 1(1976)). While Congress acknowledged that awarding attorney's fees to defendants under Section 1988 may be appropriate in some instances, it noted with approval that "courts have developed a different standard for awarding fees to prevailing defendants because they do 'not appear before the court cloaked in a mantle of public interest.'" H.R. REP. NO. 94-1558, at 6 (1976) (quoting *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3d Cir. 1975)).

Moreover, Respondents do not seriously attempt to reconcile the Court of Appeals' holding with this Court's decisions in *Christiansburg* and *Hensley*. In *Christiansburg*, this Court determined that the plaintiff's claims were *not* frivolous, despite the fact that the statutory language enabling the Title VII lawsuit at issue did not apply to the claim at issue. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423-24 (1978). Unlike the plaintiff in *Christiansburg*, Mr. Fox's claim was grounded in facts showing meritorious violations of his rights and was found to be frivolous only after extensive fact discovery had been developed in litigation. Pet. App. at 3a. Thus, when determining whether Mr. Fox's claim was "frivolous," the Court of Appeals failed to recognize the high bar set by this Court in *Christiansburg*.

The Court of Appeals also neglected *Hensley* in failing to consider Respondents' overall success in Mr. Fox's suit prior to awarding fees. In *Hensley*, this Court directed that where a prevailing plaintiff's

claims are interrelated, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended in the litigation." 461 U.S. at 434-35. The Court of Appeals in this case failed to analyze the defendants' overall success in the suit. Instead, the court awarded Respondents attorney's fees for substantially *all* of their efforts in the litigation below, failing to undertake any effort to segregate expenses associated with Mr. Fox's non-Section 1983 claims. App. at 28a-30a, 32a-33a.

Respondents cannot reconcile the Court of Appeals' conclusions with this Court's precedent or the legislative history of Section 1988. Thus, this Court should grant certiorari to correct the error below.

III. Respondents Mischaracterize Mr. Fox's Action, Which Is A Strong Vehicle For Certiorari On This Important Issue.

As described in Mr. Fox's petition, the facts of this case present a compelling setting for resolution of the question that has split the circuits. Pet. at 10-13. Mr. Fox is the prototypical "private attorney general" contemplated by 42 U.S.C. § 1983 who in good faith brought an action against Respondents after suffering as the target of their extortion scheme. After voluntarily conceding his federal claim, Mr. Fox was slapped with more than $50,000 in attorney's fees, even though he continues to maintain valid state law claims that were remanded and are set to be tried.

Respondents' attempts to diminish Mr. Fox's case are unfounded and unsupported by the record. As the Court of Appeals recognized, Mr. Vice was tried and found guilty of extortion in state criminal court on the same set of facts alleged in Mr. Fox's civil case, and discovery in the civil case produced evidence of Mr. Vice's participation in the filing of a false police report. *See* Pet. App. at 3a. Respondents do not deny these facts, but instead point out that Mr. Vice's conviction "was subject to appeal at the time of this civil proceeding." Opp. at 7. The significance of this detail is unclear, and in any case, Respondents fail to mention that Mr. Vice's conviction has now been affirmed. *See State v. Vice*, 2008 WL 5169955 (La. App. 3d Cir. 2008).

Respondents mischaracterize several other facts regarding Mr. Fox's action against them. Most significantly, Respondents repeatedly contend that Mr. Fox's state law claims were raised "at the last minute." *E.g.*, Opp. at 1, 6-7, 21-22, 24. This is simply untrue. As reflected in the petition for damages attached to Respondents' brief as Appendix A, Mr. Fox brought this action in Louisiana *state* court. Opp. App. at 1b. It was *Respondents* who later removed the action to federal court. Pet. App. at 23a. Mr. Fox's initial petition for damages alleged all of the facts giving rise to his action, which is all that is necessary under Louisiana state civil procedure. *See Cox v. W.M. Heroman & Co., Inc.*, 298 So. 2d 848, 855 (La. 1974) ("So long as the Facts constituting the claim or defense are alleged or proved, the party may be granted any relief to which he is entitled under the fact-pleadings and evidence; the 'theory of the case' is abolished as a pleading

requirement or restriction.") (overruled on other grounds, *A. Copeland Enterprises Inc. v. Slidell Memorial Hosp.*, 657 So. 2d 1292 (La. 1995)).

Indeed, pursuant to Louisiana procedure, Mr. Fox stated a claim for all state law torts and constitutional claims supported by the alleged facts at the outset of this action. At no time did Mr. Fox file an amended petition for damages that suddenly inserted state law claims. As recognized by the Court of Appeals and both magistrate judges in this case, Mr. Fox's original petition for damages "claim[ed] federal and state causes of action." *Id.* at 3a, 21a, 38a. Paragraph 14 of the petition for damages clearly shows that Mr. Fox pled his Section 1983 claim "[i]n the alternative" to his state law claims, which included causes of action for extortion, intentional infliction of emotional distress, and defamation. Opp. App. at 5b. It is difficult to believe that Respondents seriously understood that Mr. Fox did not allege state claims from the outset, given that this action commenced in state court and was subsequently remanded to state court for trial on the state claims supported by Mr. Fox's originally pled facts in his petition.

Lastly, Respondents make much of the fact that Mr. Fox eventually conceded his federal claim after 18 months of discovery, suggesting that this proves he had no reason to assert this claim in the first place. Opp. at 7-9. This assumption is unfounded and has been rejected by this Court. *See Christiansburg*, 434 U.S. at 421-22 (courts should "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a

plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation"). Indeed, the fact that Respondents had to engage in intensive fact discovery for 18 months before attempting to show these claims were frivolous undermines their argument that these claims were frivolous from the start. Moreover, Mr. Fox's decision to voluntarily concede this claim after determining it was meritless is an action that should be *encouraged*, not deterred, among civil rights plaintiffs. Pet. at 21-22.

Respondents' suggestion that Mr. Fox's case exemplifies the dangers of allowing a plaintiff to avoid attorney's fees by "bootstrapping a state tort law claim to its suit" makes no sense, given that if a defendant shows that an entire action is frivolous, they can recover their attorney's fees. In reality, Mr. Fox's action involves a resource-constrained plaintiff exploring all legal theories (many of which are meritorious) supported by an underlying wrong perpetuated by Respondents. This is something that Congress sought to encourage through Section 1988, not deter. Pet. at 21.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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September 7, 2010

JOINT APPENDIX

Supreme Court, U.S.
FILED
DEC 23 2010
OFFICE OF THE CLERK

No. 10-114

IN THE

Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton, and TOWN OF VINTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari filed July 15, 2010
Certiorari granted November 1, 2010

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493

TABLE OF CONTENTS

DOCUMENT	PAGE NO.
District Court Docket Sheet	1
Extortion Letter	33
Petition for Damages (12/20/05, DKT 1)	37
Notice of Removal Based on Federal Question Jurisdiction (1/25/06, DKT 3)	44
Answer to Petition for Damages by Arthur Phillips (2/13/06, DKT 8)	49
Answer and Affirmative Defense To Petition for Damages by Troy Cary (2/24/06, DKT 11)	55
Answer by Town of Vinton (2/28/06, DKT 13)	62
Answer and Affirmative Defenses on Behalf of Billy Ray Vice (3/20/06, DKT 18)	70
Motion for Dismissal without Prejudice (5/1/07, DKT 31)	76

Plaintiff's Motion for Summary Judgment Against Billy Ray Vice and the Town of Vinton and Memorandum in Support (5/3/07, DKT 33) 77

Exhibit 2, Indictment 85

Judgment of Dismissal without Prejudice (5/16/07, DKT 39) 87

Memorandum of Billy Ray Vice in Opposition To Partial Motion for Summary Judgment (8/20/07, DKT 63) 89

Memorandum by Town of Vinton in Opposition To Partial Motion for Summary Judgment Filed by Ricky D. Fox (8/20/07, DKT 64) 104

Plaintiff's Reply Memorandum To Opposition by Town of Vinton and Billy Ray Vice To Plaintiff's Partial Motion for Summary Judgment (8/24/07, DKT 66) 124

Motion for Summary Judgment by Billy Ray Vice, and Memorandum in Support (9/14/07, DKT 71)..... 128

Memorandum in Support of Motion for Judgment on the Pleadings and Motion for Summary Judgment on Behalf of the Town of Vinton (9/14/07, DKT 72)..... 130

Plaintiff Ricky Fox's Memorandum in Opposition To Defendants Town of Vinton's and Troy Cary's Motion for Judgment on the Pleadings and Motion forSummary Judgment, and Defendant Vice's Motion for Summary Judgment (9/28/07, DKT 77) 168

Exhibit 1, Affidavit of Chad Porterfield..... 176

Memorandum of Defendant [sic] in Opposition To Motion for Summary Judgment Filed by Shelter Mutual Insurance Company and Statement of Contested Facts (10/9/07, DKT 83)..... 178

Reply Memorandum by the Town of Vinton (10/12/07, DKT 90)..... 182

Memorandum in Support of Motion
for Attorney's Fees and Costs
(10/31/07, DKT 107) 198

Exhibits A, B and C,
Correspondence Between Parties 200

Plaintiff's Opposition To Defendants'
Motion for Attorney's Fees and Costs
(11/9/07, DKT 111)
Exhibits 26 – 31,
Correspondence between Parties..... 207

Joe Budwine Deposition Excerpts
(2/28/07) 220

Arthur Phillips Deposition Excerpts
(2/28/07) 271

Joe Duenas and Kent Peveto
Criminal Trial Excerpts (4/11/07) 300

Kenneth Delcambre Deposition
Excerpts (4/12/07) 316

Ricky Fox Deposition Excerpts
(7/2/07) 324

Troy Cary Deposition Excerpts
(9/5/07) 387

Billy Ray Vice Deposition Excerpts
(9/6/07) 428

CASREF, APPEAL, CLOSED

U.S. District Court
Western District of Louisiana (Lake Charles)
CIVIL DOCKET FOR CASE #: 2:06-cv-00135-APW

Fox v. Vice et al
Assigned to: Magistrate Judge Alonzo P Wilson
Referred to:
Demand: $0
Lead Docket: None
Related Cases: None
Cases in other court: None
Cause: 42:1983 Civil Rights Act

Date Filed: 1/25/2006
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Filing Date	#	Docket Text
1/25/2006	1	COMPLAINT against Billy Ray Vice, Arthur Phillips, Troy Cary, Town of Vinton, filed by Ricky D Fox in 14th JDC, Calcasieu Parish; #2005-5932-B on 12/20/05. (crt,Dean, S) (Entered: 2/1/2006)
1/25/2006	2	SUMMONS ISSUED as to Town of Vinton in 14th JDC, Calcasieu Parish; #2005-5932-B on 12/20/05. (crt,Dean, S)

		(Entered: 2/1/2006)
1/25/2006	3	NOTICE of Removal by Town of Vinton from 14th JDC, Calcasieu Parish; case number 2005-5932-B. (Attachments: # (1) Exhibit A; # (2) Civil cover sheet)(crt,Dean, S) (Entered: 2/1/2006)
1/25/2006	4	CONSENT TO REMOVAL by Arthur Phillips. (crt,Dean, S) (Entered: 2/1/2006)
1/25/2006	5	CONSENT TO REMOVAL by Billy Ray Vice. (crt,Dean, S) (Entered: 2/1/2006)
1/25/2006	6	CONSENT TO REMOVAL by Troy Cary. (crt,Dean, S) (Entered: 2/1/2006)
1/30/2006		FILING FEE: on behalf of Town of Vinton in the amount of $250.00, receipt number 125976 (crt,Lundy, N) (Entered: 1/31/2006)
2/3/2006	7	REMOVAL ORDER forwarded to all counsel of record. Signed by Judge Robert H Shemwell Sr on February 3, 2006. (crt,Dean, S) (Entered: 2/3/2006)
2/13/2006	8	ANSWER to Petition for Damages; by Arthur Phillips.(crt,Meuleman, Angella) (Entered: 2/14/2006)

2/16/2006	9	MOTION for Extension of Time to File Answer re [1] Complaint by Billy Ray Vice. (Attachments: # (1) Proposed Order)(crt,Meuleman, Angella) Modified on 2/27/2006 to remove deficient status; see [12] Corrective Document/Certificate of Consent (Wormser, C). (Entered: 2/21/2006)
2/21/2006	10	NOTICE of Deficiency to Michael Dean Hebert on behalf of Billy Ray Vice re: Motion For Extension of Time to File Responsive Pleadings submitted on February 16, 2006. Reason: Needs statement of consent by parties. (crt,Meuleman, Angella) (Entered: 2/21/2006)
2/21/2006	11	ANSWER to Complaint by Troy Cary.(crt, Wormser, C) (Entered: 2/24/2006)
2/24/2006	12	CORRECTIVE DOCUMENT entitled Certificate of Consent filed by Billy Ray Vice regarding [9] MOTION for Extension of Time to File Answer re [1] Complaint. (crt, Wormser, C) (Entered: 2/27/2006)
2/28/2006	13	ANSWER to Complaint by Town of Vinton.(aty,Miller,

		John) (Entered: 2/28/2006)
2/28/2006	14	RESPONSE TO REMOVAL ORDER by Town of Vinton. (Attachments: # (1) State Suit Record - Part 1# (2) State Suit Record - Part 2# (3) State Suit Record - Part 3)(aty,Miller, John) (Entered: 2/28/2006)
2/28/2006	15	SUMMONS Returned Executed by Ricky D Fox. Billy Ray Vice served on 12/22/2005, answer due 1/11/2006. (Filed in the 14th JDC/Calcasieu Parish; #2005-5932 Div B on 1/3/06.) (crt,Whidden, C) (Entered: 3/1/2006)
2/28/2006	16	NOTICE OF REMOVAL by Town of Vinton. (Filed in the 14th JDC/Calcasieu Parish; #2005-5932 Div B on 1/30/06.) (crt,Whidden, C) (Entered: 3/1/2006)
3/1/2006	17	ORDER granting [9] Motion for Extension of Time to Answer re [1] Complaint Billy Ray Vice answer due 3/20/2006. Signed by Judge Alonzo P Wilson on 3/1/06. (crt,Whidden, C) (Entered: 3/3/2006)
3/20/2006	18	ANSWER to Complaint by Billy Ray Vice.(crt,Wormser, C) (Entered: 3/22/2006)

4/25/2006	19	ORDER Scheduling Conference set for 5/18/2006 09:30 AM before Honorable Alonzo P Wilson. (Attachments: # (1) Attachments to scheduling order)(crt,Monceaux, P) (Entered: 4/25/2006)
4/28/2006		RECEIVED CONSENT TO PROCEED FORM by Arthur Phillips. (crt,Benoit, T) (Entered: 4/28/2006)
4/28/2006		RECEIVED CONSENT TO PROCEED FORM by Billy Ray Vice. (crt,Williams, L) (Entered: 5/1/2006)
5/4/2006		RECEIVED CONSENT TO PROCEED FORM by Ricky D Fox. (crt,Monceaux, P) (Entered: 5/4/2006)
5/4/2006		RECEIVED CONSENT TO PROCEED FORM by Troy Cary. (crt,Monceaux, P) (Entered: 5/4/2006)
5/11/2006	20	ORDER REFERRING CASE to Magistrate Judge Alonzo P Wilson for trial. Judge Patricia Minaldi no longer assigned to case as presiding judge. Signed by Judge Patricia Minaldi on May 10, 2006. (crt,Benoit, T) (Entered: 5/11/2006)
5/11/2006		RECEIVED CONSENT TO PROCEED FORM by Town of

		Vinton. (crt,Whidden, C) (Entered: 5/12/2006)
5/15/2006	21	RULE 26(f) Report. (aty,Miller, John) (Entered: 5/15/2006)
5/15/2006	22	CONCURRENCE with the [21] Proposed Rule 26(f) Discovery Plan; by Billy Ray Vice. (crt, Wormser, C) (Entered: 5/17/2006)
5/18/2006	23	TRIAL FIXING ORDER: Bench Trial set for 8/6/2007, at 09:00 AM in Lake Charles, courtroom 3 before Honorable Alonzo P Wilson. Signed by Judge Alonzo P Wilson on 05/18/2006. (crt,Barkley, B) (Entered: 5/18/2006)
5/18/2006	24	Standing Order Governing Pretrial Procedure. Signed by Judge Alonzo P Wilson on 05/18/2006. (crt,Barkley, B) (Entered: 5/18/2006)
5/18/2006	25	Standing Order Governing Pretrial Procedure. Signed by Judge Alonzo P Wilson on 05/18/2006. (crt,Barkley, B) (Entered: 5/18/2006)
8/8/2006	26	MOTION for André J. Buisson to Enroll as Counsel *(Additional)* by Town of Vinton. (aty,Buisson, Andre) (Entered: 8/8/2006)

8/8/2006	27	PROPOSED ORDER/JUDGMENT by Town of Vinton re [26] MOTION for André J. Buisson to Enroll as Counsel *(Additional)*. (aty,Buisson, Andre) (Entered: 8/8/2006)
8/9/2006	28	ORDER granting [26] Motion to Enroll André J Buisson as Additional Counsel. Signed by Judge Alonzo P Wilson on August 9, 2006. (crt,Berry, D) (Entered: 8/9/2006)
9/5/2006	29	MOTION for Randall E Hart to Enroll as Co-Counsel of record by Ricky D Fox. (Attachments: # (1) Proposed Order)(crt,Wormser, C) (Entered: 9/5/2006)
9/6/2006	30	ORDER granting [29] Motion for Randall E Hart to Enroll as Co- Counsel of record. Signed by Judge Alonzo P Wilson on 9/6/06. (crt,Wormser, C) (Entered: 9/6/2006)
5/1/2007	31	VOLUNTARY MOTION to Dismiss Claims against Arthur Phillips Without Prejudice, reserving all rights to proceed against all other named defendants by Ricky D Fox. (Attachments: # (1) Proposed Order)(crt,Dean, S) (Entered: 5/1/2007)

5/3/2007	33	MOTION for Summary Judgment Against Billy Ray Vice and Town of Vinton on the Issue of Liability for Extortion Claim by Ricky D Fox. (Attachments: # (1) Memorandum in Support; # (2) Exhibits; # (3) Statement of material facts; # (4) Proposed Judgment) (crt,Williams, L) (Entered: 5/4/2007)
5/4/2007	32	MOTION to Continue Trial and Deadlines with opposition by Troy Cary, Town of Vinton. (Attachments: # (1) Text of proposed order) (aty,Miller, John) (Entered: 5/4/2007)
5/4/2007	34	NOTICE of Motion Setting regarding [33] MOTION for Summary Judgment. (crt,Williams, L) (Entered: 5/4/2007)
5/4/2007	35	MOTION to Continue Trial and All Deadlines in the Scheduling Order, with opposition, by Billy Ray Vice. (Attachments: # (1) Proposed Order)(crt,Dean, S) (Entered: 5/7/2007)
5/7/2007	36	MOTION FOR EXTENSION of Discovery and Dispositive Motion Deadlines with opposition by Town of Vinton. (Attachments: # (1) Text of proposed order)(aty,Miller,

		John) (Entered: 5/7/2007)
5/7/2007	37	RE-NOTICE of Motion Setting without oral argument regarding [33] MOTION for Summary Judgment. Motion day set for 6/12/2007 before Honorable Alonzo P Wilson. (crt,Williams, L) (Entered: 5/7/2007)
5/9/2007		Set/Reset Hearings: Bench Trial set for 11/13/2007 09:00 AM in Lake Charles, courtroom 3 before Honorable Alonzo P Wilson. (jud,Wilson, Alonzo) (Entered: 5/9/2007)
5/9/2007		ORDER granting [32] Motion to Continue, granting [35] Motion to Continue, mooting [36] Motion to Extend. The trial date is refixed for November 13,2007. Pursuant to the standing order all deadlines are refixed based on the new trial date. Signed by Judge Alonzo P Wilson on 05/09/07. (jud,Wilson, Alonzo) (Entered: 5/9/2007)
5/14/2007	38	MOTION for Extension of Time to File Response/Reply as to [33] MOTION for Summary Judgment with consent by Town of Vinton. (Attachments: # (1) Text of proposed order)(aty,Miller, John) (Entered: 5/14/2007)

5/16/2007	39	JUDGMENT granting [31] Joint/Voluntary Motion to Dismiss, without prejudice, reserving all rights against other defendants. Signed by Judge Alonzo P Wilson on 5/16/07. (crt,Monceaux, P) (Entered: 5/16/2007)
5/16/2007	40	ORDER granting [38] Motion for Extension of Time to File Response/Reply re [33] MOTION for Summary Judgment. Signed by Judge Alonzo P Wilson on 5/16/07. (crt,Alexander, E) (Entered: 5/16/2007)
6/12/2007	41	DEFICIENT MOTION for Christopher P Ieyoub to Enroll as Counsel by Billy Ray Vice. (Attachments: # (1) Proposed Order) (crt,Alexander, E) Modified on 6/21/2007; replaced by entirely new document #46 (Dean, S). (Entered: 6/14/2007)
6/12/2007	43	DEFICIENT MOTION for Extension of Time to File Response/Reply as to [33] MOTION for Summary Judgment by Billy Ray Vice. (Attachments: # (1) Proposed Order)(crt,Williams, L) Modified on 6/21/2007; replaced by entirely new document #45 (Dean, S). (Entered: 6/14/2007)

6/14/2007	42	NOTICE of Deficiency to Christopher P Ieyoub on behalf of Billy Ray Vice regarding [41] MOTION for Christopher P Ieyoub to Enroll as Counsel. Reason: This party is already represented by other counsel. (crt,Alexander, E) (Entered: 6/14/2007)
6/14/2007	44	NOTICE of Deficiency to Christopher P Ieyoub on behalf of Billy Ray Vice regarding [43] DEFICIENT? MOTION for Extension of Time to File Response/Reply as to [33] MOTION for Summary Judgment. Reason: You do not indicate whether opposing counsel consent to the granting of this ex parte motion. (crt,Williams, L) (Entered: 6/14/2007)
6/20/2007	45	MOTION for Extension of Time to File Response/Reply as to [33] MOTION for Summary Judgment, with consent, by Billy Ray Vice. (Attachments: # (1) Proposed Order)(crt,Dean, S) (Entered: 6/21/2007)
6/20/2007	46	MOTION to Substitute Attorney Christopher P Ieyoub in place of Michael Hebert by Billy Ray Vice. (Attachments: # (1) Proposed Order)(crt,Dean, S) (Entered: 6/21/2007)

6/22/2007	47	ORDER granting [46] Motion to Substitute Attorney. Added attorney Christopher P Ieyoub for Billy Ray Vice. Attorney Michael Dean Hebert terminated. Signed by Judge Alonzo P Wilson on 06/21/07. (crt,Williams, L) (Entered: 6/22/2007)
6/22/2007	48	ORDER granting [45] Motion for Extension of Time to File Response/Reply re [33] MOTION for Summary Judgment. Signed by Judge Alonzo P Wilson on 06/21/07. (crt,Williams, L) (Entered: 6/22/2007)
6/26/2007	49	MOTION to Withdraw André J. Buisson as Attorney by Town of Vinton. (aty,Buisson, Andre) (Entered: 6/26/2007)
6/26/2007	50	PROPOSED ORDER/JUDGMENT by Town of Vinton re [49] MOTION to Withdraw André J. Buisson as Attorney. (aty,Buisson, Andre) (Entered: 6/26/2007)
6/28/2007	51	MOTION to Intervene as a Defendant under Rule 24 (with consent) by Shelter Mutual Insurance Co. (Attachments: # (1) Proposed Order; # (2) Proposed pleading)(crt,Alexander, E)

		(Entered: 6/28/2007)
6/29/2007	52	ORDER granting [49] Motion to Withdraw as Attorney. Attorney Andre J Buisson terminated. Signed by Judge Alonzo P Wilson on June 29, 2007. (crt,Dean, S) (Entered: 6/29/2007)
6/29/2007	53	ORDER granting [51] Motion to Intervene as Defendant. Signed by Judge Alonzo P Wilson on 6/29/07. (crt,Alexander, E) (Entered: 6/29/2007)
6/29/2007	54	INTERVENTION filed by Shelter Mutual Insurance Co. (crt,Alexander, E) (Entered: 7/2/2007)
7/2/2007	55	EX PARTE MOTION for Production of Evidence from State Court by Ricky D Fox. (Attachments: # (1) Proposed Order)(crt,Williams, L) (Entered: 7/3/2007)
7/2/2007	65	ORDER granting [55] Ex Parte Motion for Production of Evidence from State Court. Signed by Judge Alonzo P Wilson on 07/02/07. (crt,Williams, L) (Entered: 8/22/2007)
7/12/2007	56	MOTION for Extension of Time to File Response/Reply as to [33] MOTION for Summary

		Judgment with consent by Town of Vinton. (Attachments: # (1) Text of proposed order)(aty,Miller, John) (Entered: 7/12/2007)
7/16/2007	57	MOTION for Extension of Time to File Response/Reply Consent obtained by Billy Ray Vice. (aty,Ieyoub, Christopher) Modified to reflect Proposed Order filed within pdf of Main Document on 7/16/2007. (Alexander, E) (Entered: 7/16/2007)
7/16/2007	58	ORDER granting [56] Motion for Extension of Time to File Response/Reply re [33] MOTION for Summary Judgment; Responses due by 8/15/2007. Signed by Judge Alonzo P Wilson on July 16, 2007. (crt,Dean, S) (Entered: 7/17/2007)
8/8/2007	59	MOTION FOR EXTENSION of Time to File Motion for Summary Judgment with consent by Shelter Mutual Insurance Co. (Attachments: # (1) Text of proposed order)(aty,Wilkes, Gregg) (Entered: 8/8/2007)
8/10/2007	60	ORDER granting [59] MOTION FOR EXTENSION of Time to File Motion for Summary

		Judgment with consent. Signed by Judge Alonzo P Wilson on 08/10/07. (crt,Williams, L) (Entered: 8/13/2007)
8/13/2007	61	MOTION FOR EXTENSION of Discovery and Dispositive Motion Deadline and to Respond to Motion for Summary Judgment filed by Plaintiff with consent sought but not obtained by Town of Vinton. (Attachments: # (1) Text of proposed order)(aty,Miller, John) Modified on 8/14/2007 to edit text(Williams, L). (Entered: 8/13/2007)
8/14/2007	62	MOTION for Extension of Time to File Response/Reply consent by Billy Ray Vice. (Attachments: # (1))(aty,Ieyoub, Christopher) (Entered: 8/14/2007)
8/15/2007		ORDER mooting [57] Motion for Extension of Time to File Response/Reply re [33] MOTION for Summary Judgment, granting in part and denying in part [61] Motion to Extend, granting in part and denying in part [62] Motion for Extension of Time to File Response/Reply re [33] MOTION for Summary Judgment. Responses to pending motion for summary judgment

		due by 8/20/2007. Replies due by 8/27/2007.The discovery and dispositive motion deadlines are extended to 9/14/07. Otherwise, the motions are denied. Signed by Judge Alonzo P Wilson on 08/15/07. (jud,Wilson, Alonzo) (Entered: 8/15/2007)
8/15/2007		Set/Reset Deadlines: Discovery due by 9/14/2007. Dispositive Motions due by 9/14/2007. (jud,Wilson, Alonzo) (Entered: 8/15/2007)
8/20/2007	63	MEMORANDUM in Opposition re [33] MOTION for Summary Judgment filed by Billy Ray Vice. (Attachments: # (1) Statement of material facts)(aty,Ieyoub, Christopher) Modified on 8/20/2007 to reflect that Exhibits A and B are included within pdf of Main Document (Williams, L). (Entered: 8/20/2007)
8/20/2007	64	MEMORANDUM in Opposition re [33] MOTION for Summary Judgment filed by Town of Vinton. (Attachments: # (1) Table of Contents# (2) Table of Authorities# (3) Exhibits # (4) Statement Regarding Material Facts)(aty,Miller, John) (Entered: 8/20/2007)
8/24/2007	66	REPLY to Response to Motion re [33] MOTION for Summary

		Judgment filed by Ricky D Fox. (crt,Alexander, E) (Entered: 8/27/2007)
9/14/2007	67	MOTION for Summary Judgment by Shelter Mutual Insurance Co. (Attachments: # (1) Statement of material facts # (2) Memorandum / Brief # (3) Exhibits Exhibit 1# (4) Exhibits Exhibit 2# (5) Exhibit 3) (aty,Wilkes, Gregg) (Entered: 9/14/2007)
9/14/2007	68	NOTICE of Motion Setting without oral argument regarding [67] MOTION for Summary Judgment. Motion day set for 10/9/2007 before Honorable Alonzo P Wilson. (crt,Williams, L) (Entered: 9/14/2007)
9/14/2007	69	MOTION to Compel, MOTION for Attorney Fees by Ricky D Fox. (Attachments: # (1) Memorandum in Support; # (2) Exhibits; # (3) Attorney Certification; # (4) Proposed Order)(crt,Alexander, E) (Entered: 9/14/2007)
9/14/2007	70	NOTICE of Motion Setting without oral argument regarding [69] MOTION to Compel MOTION for Attorney Fees. Motion day set for 10/9/2007 before Honorable Alonzo P Wilson. (crt,Alexander, E)

		(Entered: 9/14/2007)
9/14/2007	71	MOTION for Summary Judgment by Billy Ray Vice. (Attachments: # (1) Statement of Material Facts # (2) Proposed Order)(aty,Ieyoub, Christopher) Modified on 9/17/2007 to reflect Memorandum in Support included within pdf of Main Document and to describe attachments(Williams, L). (Entered: 9/14/2007)
9/14/2007	72	MOTION for Judgment on the Pleadings *and Motion for Summary Judgment* by Troy Cary, Town of Vinton. (Attachments: # (1) Memorandum / Brief # (2) Statement of material facts # (3) Text of proposed order # (4) Text of proposed order # (5) Text of proposed order # (6) Exhibits A# (7) Exhibits B# (8) Exhibits C# (9) Exhibits D# (10) Exhibits E# (11) Exhibits F# (12) Exhibits G - Notice of Manual Attachment# (13) Exhibits H)(aty,Miller, John) Modified on 9/17/2007 to edit text(Williams, L).Modified on 9/17/2007 to remove "qc" date(Williams, L). (Entered: 9/14/2007)

9/14/2007		MOTION for Summary Judgment by Town of Vinton. ADMINISTRATIVE ENTRY as [72] Motion for Judgment on the Pleadings electronically filed without selecting all reliefs requested in pleading. (crt,Williams, L) (Entered: 9/17/2007)
9/14/2007		MANUAL Attachment Received from John Mark Miller on behalf of Town of Vinton regarding [72] MOTION for Judgment on the Pleadings *and Motion for Summary Judgment*. Attachments located in Lake Charles division. (crt,Monceaux, P) (Entered: 9/18/2007)
9/14/2007	75	MOTION for Summary Judgment by Billy Ray Vice. (Attachments: # (1) Memorandum in Support; # (2) Statement of material facts; # (3) Proposed Order)(crt,Dean, S) (Entered: 9/20/2007)
9/17/2007	73	NOTICE of Motion Setting without oral argument regarding [71] MOTION for Summary Judgment. Motion day set for 10/9/2007 before Honorable Alonzo P Wilson. (crt,Williams, L) (Entered: 9/17/2007)

9/18/2007	74	NOTICE of Motion Setting without oral argument regarding [72] MOTION for Judgment on the Pleadings *and Motion for Summary Judgment*. Motion day set for 10/9/2007 before Honorable Alonzo P Wilson. (crt,Williams, L) (Entered: 9/18/2007)
9/20/2007	76	NOTICE of Motion Setting without oral argument regarding [75] MOTION for Summary Judgment. Motion day set for 10/9/2007 before Honorable Alonzo P Wilson. (crt,Dean, S) (Entered: 9/20/2007)
9/28/2007	77	MEMORANDUM in Opposition re [75] MOTION for Summary Judgment, [71] MOTION for Summary Judgment, [72] MOTION for Judgment on the Pleadings *and Motion for Summary Judgment* filed by Ricky D Fox. (Attachments: # (1) Notice of manual attachment, # (2) Statement of Contested Facts)(crt,Williams, L) (Entered: 9/28/2007)

10/1/2007	78	MOTION for Extension of Time to File Response/Reply as to [67] MOTION for Summary Judgment Consent by Billy Ray Vice. (Attachments: # (1))(aty,Ieyoub, Christopher) (Entered: 10/1/2007)
10/3/2007	79	ORDER granting [78] Motion for Extension of Time to File Response/Reply re [67] MOTION for Summary Judgment. Responses due by 10/9/2007. Signed by Judge Alonzo P Wilson on 10/3/07. (crt,Monceaux, P) (Entered: 10/3/2007)
10/9/2007	80	MOTION for Leave to File Reply Memorandum consent by Town of Vinton. (Attachments: # (1) Text of proposed order # (2) Proposed pleading Repy Memorandum# (3) Exhibits # (4) Exhibits # (5) Exhibits)(aty,Miller, John) (Entered: 10/9/2007)
10/9/2007	83	DEFICIENT? MOTION for Gregory P Marceaux to Enroll as Counsel by Billy Ray Vice. (Attachments: # (1) Proposed Order; # (2) Proposed Memorandum in Opposition; # (3) Proposed Exhibit) (crt,Alexander, E) (Entered: 10/10/2007)
10/10/2007	81	MOTION for Leave to File a Reply Memorandum by Troy Cary. (Attachments: # (1) Text of

		proposed order Order for Leave# (2) Proposed Reply Brief)(aty,Thomas, John) Modified on 10/10/2007 to edit text(Williams, L). (Entered: 10/10/2007)
10/10/2007	82	MOTION for Leave to File *Reply Brief* by Billy Ray Vice. (Attachments: # (1) Text of proposed order # (2) Memorandum / Brief)(aty,leyoub, Christopher) (Entered: 10/10/2007)
10/10/2007	84	NOTICE of Deficiency to Gregory P Marceaux on behalf of Billy Ray Vice regarding [83] DEFICIENT? MOTION for Gregory P Marceaux to Enroll as Counsel. Reason: This party is already represented by other counsel. (crt, Alexander, E) (Entered: 10/10/2007)
10/10/2007	85	MOTION to Remand, or Alternatively MOTION to Continue Trial with opposition by Ricky D Fox. (Attachments: # (1) Memorandum in Support; # (2) Proposed Order)(crt,Williams, L) (Entered: 10/11/2007)
10/11/2007	86	NOTICE of Motion Referred to Chambers due to trial setting of 11/13/07 re [85] MOTION to Remand or Alternatively MOTION to Continue Trial with

		opposition. (crt,Williams, L) (Entered: 10/11/2007)
10/12/2007	87	PRETRIAL STATEMENT by Town of Vinton. (aty,Miller, John) Modified on 10/15/2007 to edit text(Williams, L). (Entered: 10/12/2007)
10/12/2007	88	EXHIBIT LIST by Town of Vinton. (aty,Miller, John) (Entered: 10/12/2007)
10/12/2007	89	ORDER granting [80] Motion for Leave to File Reply Memorandum. Signed by Magistrate Judge Alonzo P Wilson on 10/12/07. (crt,Alexander, E) (Entered: 10/15/2007)
10/12/2007	90	REPLY to Response to Motion re [72] MOTION for Judgment on the Pleadings *and Motion for Summary Judgment* filed by Town of Vinton. (Attachments: # (1) Exhibits)(crt,Alexander, E) (Entered: 10/15/2007)
10/12/2007	91	ORDER granting [81] Motion for Leave to File Reply Memorandum. Signed by Magistrate Judge Alonzo P Wilson on 10/12/07. (crt,Alexander, E) (Entered: 10/15/2007)

Show Desktop.sc 10/12/2007	92	REPLY to Response to Motion re [72] MOTION for Judgment on the Pleadings *and Motion for Summary Judgment* filed by Troy Cary. (crt,Alexander, E) (Entered: 10/15/2007)
10/12/2007	93	ORDER granting [82] Motion for Leave to File Reply Brief. Signed by Judge Alonzo P Wilson on 10/12/07. (crt,Williams, L) (Entered: 10/15/2007)
10/12/2007	94	REPLY MEMORANDUM re [71] MOTION for Summary Judgment filed by Billy Ray Vice. (crt,Williams, L) (Entered: 10/15/2007)
10/15/2007	95	PRETRIAL Statement of Billy Ray Vice by Billy Ray Vice. (aty,Ieyoub, Christopher) Modified on 10/16/2007 to edit text (Williams, L). (Entered: 10/15/2007)
10/15/2007	96	EXHIBIT LIST by Billy Ray Vice. (aty,Ieyoub, Christopher) (Entered: 10/15/2007)
10/15/2007	97	MOTION in Limine *and Memorandum in Support* by Billy Ray Vice. (Attachments: # (1) Exhibit A # (2) Exhibit B # (3) Excerpts of Billy Vice Video Deposition # (4) Affidavit of Harold Thibodeaux) (aty, Ieyoub, Christopher) Modified on

		10/16/2007 to describe attachments and to indicate that Memorandum in Support is included within pdf of Main Document (Williams, L). (Entered: 10/15/2007)
10/15/2007	98	MOTION in Limine by Town of Vinton. (Attachments: # (1) Memorandum / Brief # (2) Text of proposed order)(aty,Miller, John) (Entered: 10/15/2007)
10/15/2007	99	EXHIBIT LIST *Amended* by Town of Vinton. (aty,Miller, John) (Entered: 10/15/2007)
10/16/2007	100	NOTICE of Motion Referred to Chambers due to trial setting of 11/13/07 regarding [98] MOTION in Limine, [97] MOTION in Limine *and Memorandum in Support*. (crt,Williams, L) (Entered: 10/16/2007)

10/16/2007	101	MEMORANDUM RULING granting [72] MOTION for Judgment on the Pleadings *and Motion for Summary Judgment* filed by Town of Vinton and Troy Cary; granting [75] MOTION for Summary Judgment filed by Billy Ray Vice to the extent federal claims against the defendants are dismissed with prejudice; and granting [85] MOTION to Remand filed by Ricky D Fox for consideration of the remaining state law claims. Signed by Judge Alonzo P Wilson on 10/16/07. (crt,Monceaux, P) (Entered: 10/17/2007)
10/16/2007	102	JUDGMENT for the reasons stated in the Memorandum Ruling, granting [72] Motion for Judgment on the Pleadings, [75] Motion for Summary Judgment to the extent federal claims against the defendants are dismissed with prejudice; and granting [85] Motion to Remand. Signed by Judge Alonzo P Wilson on 10/16/07. (crt, Monceaux, P) (Entered: 10/17/2007)
10/16/2007	103	NOTICE of Remand to Clerk of 14th JDC/Calcasieu Parish (crt, Monceaux, P) (Entered: 10/17/2007)
10/16/2007	104	MOTION for Gregory P Marceaux to Enroll as Counsel by

		Billy Ray Vice. (Attachments: # (1) Proposed Order)(crt,Williams, L) (Entered: 10/17/2007)
10/18/2007	105	RECEIPT of Notice of Remand received by 14th JDC/Calcasieu Parish on 10/18/07. (crt,Williams, L) (Entered: 10/18/2007)
10/19/2007	106	ORDER granting [104] Motion to Enroll as Counsel. Signed by Judge Alonzo P Wilson on 10/18/07. (crt,Williams, L) (Entered: 10/19/2007)
10/31/2007	107	MOTION for Attorney Fees *and Costs* by Billy Ray Vice, Troy Cary, Town of Vinton. (Attachments: # (1) Memorandum / Brief # (2) Exhibits # (3) Exhibits # (4) Exhibits # (5) Exhibits # (6) Exhibits # (7) Text of proposed order)(aty,Miller, John) Modified on 11/5/2007 to reflect submission as Deficient(Williams, L). Modified on 11/6/2007 to remove deficiency notation. See doc [109] Corrective Document entitled Table of Contents and Table of Authorities (Williams, L). (Entered: 10/31/2007)
11/5/2007	108	NOTICE of Deficiency to John Mark Miller on behalf of Billy Ray Vice, Troy Cary, Town of Vinton regarding [107] DEFICIENT? MOTION for

		Attorney Fees *and Costs*. Reason: A table of contents is required for a brief which exceeds ten pages. Please see LR7.8W for specific requirements regarding table of contents. (crt,Williams, L) (Entered: 11/5/2007)
11/6/2007	109	CORRECTIVE DOCUMENT entitled Table of Contents and Authorities filed by Billy Ray Vice, Troy Cary, Town of Vinton regarding [107] MOTION for Attorney Fees *and Costs*. (Attachments: # (1) Table of Authorities)(aty,Miller, John) (Entered: 11/6/2007)
11/6/2007	110	NOTICE of Motion Setting without oral argument regarding [107] MOTION for Attorney Fees *and Costs*. Motion day set for 12/11/2007 before Magistrate Judge Alonzo P Wilson. (crt,Williams, L) (Entered: 11/6/2007)
11/9/2007	111	OPPOSITION to [107] MOTION for Attorney Fees *and Costs* filed by Ricky D Fox. (Attachments: # (1) Exhibits)(crt,Dean, S) (Entered: 11/13/2007)
12/5/2007	112	REPLY to Response to Motion re [107] MOTION for Attorney Fees *and Costs* filed by Town of Vinton. (Attachments: # (1) Exhibits) (aty,Miller, John)

		(Entered: 12/5/2007)
12/7/2007	113	RESPONSE to Reply Memorandum (Town of Vinton) re [107] MOTION for Attorney Fees *and Costs* filed by Ricky D Fox. (crt,Williams, L) (Entered: 12/7/2007)
2/6/2008		Motion Transferred regarding [107] MOTION for Attorney Fees *and Costs*. Motion transferred to Magistrate Judge Kathleen Kay. (crt,Dunford, T) (Entered: 2/6/2008)
9/22/2008	114	MEMORANDUM RULING re [107] MOTION for Attorney Fees *and Costs* filed by Town of Vinton, Billy Ray Vice, Troy Cary. Signed by Magistrate Judge Kathleen Kay on 09/21/08. (crt,Williams, L) (Entered: 9/23/2008)
9/23/2008	115	ORDER re [107] MOTION for Attorney Fees *and Costs* filed by Town of Vinton, Billy Ray Vice, Troy Cary. Signed by Magistrate Judge Kathleen Kay on 09/23/08. (crt,Williams, L) (Entered: 9/23/2008)
10/13/2008	116	PROPOSED JUDGMENT by Town of Vinton re [107] Motion for Attorney Fees. (Attachments: # (1) Letter)(aty, Miller, John) Modified on 10/14/2008 to edit

		text(Williams, L). (Entered: 10/13/2008)
10/16/2008	117	ORDER re [116] Proposed Order/Judgment filed by Town of Vinton. Plaintiff is to submit any objection he has as to form of the proposed judgment by electronic filing on or before October 23, 2008. If no objection is submitted, the judgment will be signed as written on October 24, 1008. Signed by Magistrate Judge Kathleen Kay on 10/16/2008. (jud,Kay, Kathleen) (Entered: 10/16/2008)
10/24/2008	118	LETTER from Randall E. Hart to Honorable Kathleen Kay that plaintiff has no objection to the form of the judgment submitted. (crt, MonceauxSld, P) (Entered: 10/24/2008)
10/24/2008	119	JUDGMENT IT IS HEREBY ORDERED that the Motion for Attoney's Fees and Costs by the Town of Vinton is GRANTED awarding fees in the amount of $32,868.00 and costs in the amount of $5,101.03; IT IS FURTHER ORDERED that the Motion for Attorney's Fees and Costs filed on behalf of Billy Ray Vice is GRANTED awarding attorney's fees in the amount of $15,813.00 and costs in the amount of $699.00.

		Signed by Magistrate Judge Kathleen Kay on 10/24/08. (crt, MonceauxSld, P) (Entered: 10/24/2008)
11/4/2008	120	NOTICE by Ricky D Fox of Appeal (aty, Hart, Randall) Modified on 11/7/2008 (LundySld, N). ADMINISTRATIVE ENTRY: THIS PLEADING E-FILED USING INCORRECT EVENT, CLERK CALLED ATTORNEY AND INSTRUCTED HIM TO RE-FILE USING THE CORRECT EVENT OF "NOTICE OF APPEAL". (Entered: 11/4/2008)
11/7/2008	121	NOTICE OF APPEAL as to [114] Order, [119] Judgment, [115] Order by Ricky D Fox. Filing fee: $ 455, receipt number 0536000000000953211. (aty,Hart, Randall) (Entered: 11/7/2008)
11/7/2008		Set/Reset Deadlines re [121] Notice of Appeal : Appeal Record due by 11/24/2008. (crt,LundySld, N) (Entered: 11/7/2008)
11/26/2008	122	USCA Case Number 08-31135 for [121] Notice of Appeal filed by Ricky D Fox. (crt,Delgado, S) (Entered: 12/17/2008)

12/30/2008	123	CERTIFIED Record on Appeal to US Court of Appeals re [121] Notice of Appeal (4 Volumes of Records). Paper record held in District clerk's office. (crt,LundySld, N) (Entered: 12/30/2008)

MR. FOX

WE ARE GLAD THAT YOU ARE FINALLY GIVING US THE OPPORTUNITY TO PAY YOU BACK FOR SOME OF THE THINGS THAT YOU HAVE DONE TO SOME OF YOUR FELLOW TROOPERS OVER THE PAST YEARS. EACH WEEK WE ARE GOING TO PUT AND ADD IN YOUR VINTON NEWSPAPER WE ARE GOING TO START OFF THE FIRST WEEK LIKE THIS.

WEEK #1 CITIZENS OF VINTON DID YOU KNOW THAT RICKY FOX WAS CHARGED WITH SEXUAL HARASSMENT OF A FEMALE TROOPER WHILE THE TROOPER WAS IN TRAINING- AT AND AUTO CRASH, TOLD HER THAT SHE HAD NICE BREAST.

WEEK #2 CITIZENS OF VINTON DID YOU KNOW THAT RICKY FOX WAS CHARGED WITH SEXUAL HARASSMENT OF A RADIO DISPATCHER AT TROOP D. A COMPLAINT WAS FILED AND HE RECEIVED A LETTER OF REPRIMAND.

WEEK# 3 CITIZENS OF VINTON DID YOU KNOW THAT RICKY FOX WAS CHARGED WITH SEXUAL HARASSMENT OF THE SAME RADIO DISPATCHER WHO HAD QUIT THE LSP AND WAS WORKING FOR SULPHUR OR WESTLAKE P.D.

LSP PULLED HIS STRIPES AND THAT IS WHEN HE WAS MADE A TROOPER AGAIN.

WEEK #4 CITIZENS OF VINTON DID YOU KNOW THAT RICKY FOX WAS HAVING ORAL SEX WITH A FEMALE ON I-10 WHILE ON DUTY AND WAS CAUGHT BY CAL. PARISH DEPUTY. NEWSPAPER WE ARE GOING TO START OFF THE FIRST WEEK LIKE THIS.

WEEK #5 CITIZENS OF VINTON DID YOU KNOW THAT RICKY FOX RECEIVED A LETTER OF REPRIMAND FOR HUNTING OVER A BAITED FIELD. SHOULD HAVE BEEN FIRED.

WEEK #6 CITIZEN OF VINTON DID YOU KNOW THAT RICKY FOX SHOT A BLACK MAN IN THE BACK WITH A SHOT GUN. HE CLAIMED THAT THE BLACK MAN HAD A GUN. THAT'S WHAT HE TOLD STATE. POLICE INVESTIGATORS. HE NEW THEY HAD NO GUN. THEY WERE BEING CHASED BECAUSE OF A BURGLARY. LT. JAMES HALL HAD A DROP GUN AND LAYED IT IN THE FIELD. THE LSP CAPTAIN THEN NORMAN ROY LT. HARRY COURVILLE AND EDDIE KERSHAW ALL KNEW THIS. THERE LOTS MORE TO THIS STORY.

WEEK #7 CITIZENS OF VINTON. DID YOU KNOW THAT RICKY FOX AND JAMIE JAMISON AND JAMES HALL WERE INVOLVED IN CRIMINAL ACTIVITY BY REMOVING CARS FROM THE INTERSTATE WITHOUT KNOWLEDGE OF THE TROOP

REGISTERING

THE CARS THEN THEY WOULD BURN ON THE SIDE OF THE ROAD OR END UP IN THE BAYOU THEY WOULD COLLECT THE INSURANCE AND SPLIT IT 3 WAYS.

WEEK #8 CITIZENS OF VINTON DID YOU KNOW THAT RICKY FOX INTIMIDATED WITNESSES IN AND INVESTIGATION AL JANICE, A TRUSTEE AT THE TROOP ANOTARIZED AFFIDAVITT ONE TIME HE THREATENED HIM. A LAWYER IN LAKE CHARLES HAS A WE GOT MORE WE JUST THOUGHT WE WOULD GIVE YOU A LITTLTASTE OF WHAT WE GOT WE WILL PROBABLY SEND A COPY OF THIS TO EVERYONE THAT SUPPORTS YOU WE DONT THINK IT WILL DO ANY GOOD TO SEND THIS LETTER OUT UNTILL AFTER

YOU START RUNNING. I KNOW ALL THE LOCAL CHURCHES AND WOMEN'S GROUP AND OTHER. POLITICIANS SUCH AS THE CHIEF.

MAYOR, AND ALDERMAN WOULD LIKE A COPY

P.S. SURE HATE THAT YOUR WIFE AND KIDS HAVE TO GO THROUGH THIS, BUT HELL THEY SHOULD BE USED TO IT LIVING WITH YOU.

RICKY D. FOX

VS. NO. 2005-005932. DIV. B

BILLY RAY VICE, ARTHUR PHILIPS, TROY CARY and THE TOWN OF VINTON

FILED: 12-20-05

14th JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

PARISH OF CACASIEU

DEPUTY CLERK OF COURTS

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes RICKY D. FOX (sometimes hereafter referred to as Tao, a U.S. citizen of the full age of majority and domiciled in Calcasieu Parish, Louisiana.

1.

The defendants herein are:

A) BILLY RAY VICE, a person of the full age of majority and domiciled in Calcasieu Parish;

B) ARTHUR PHILLIPS, a person of the full age of majority and domiciled in Jefferson County, Texas;

C) TROY CARY, a person of the full age of majority and domiciled in Jefferson Davis Parish;

D) THE TOWN OF VINTON, a duly incorporated municipality.

2.

At all times mentioned herein THE TOWN OF VINTON was a duly incorporated municipality of the State of Louisiana.

3.

At all times relevant herein BILLY RAY VICE was the Chief of Police for THE TOWN OF VINTON.

4.

At all times relevant herein ARTHUR PHILLIPS and TROY CARY were policemen for THE TOWN OF VINTON.

5.

At all times relevant herein, BILLY RAY VICE, ARTHUR PHILLIPS and TROY CARY were acting In the course and scope of their employment with THE TOWN OF VINTON, thereby rendering THE TOWN OF VINTON vicariously liable for their actions as set forth herein.

6.

At all times relevant herein petitioner, RICKY D. FOX; was an announced candidate for the position of Chief of Police for THE TOWN OF VINTON for the election scheduled for April 2, 2005.

7.

At all times relevant herein BILLY RAY VICE was an announced candidate for the position of Chief of Pollee for THE TOWN OF VINTON for the election scheduled for April 2, 2005.

8.

In or about the month of January, 2005, BILLY RAY VICE sent an anonymous letter to petitioner, RICKY O. FOX, threatening to take certain actions against FOX if FOX ran for the position of Chief of Police for THE TOWN OF VINTON; BILLY RAY VICE authored the letter, printed it at the Police Department and caused it to be mailed to petitioner.

9.

On or about February 7, 2005, ARTHUR PHILLIPS, BILLY RAY VICE and TROY CARY conspired, directed and orchestrated a confrontation between FOX and Joe Budwine, a private citizen of THE TOWN OF VINTON, at a Vinton Highschool basketball game In THE TOWN OF VINTON, whereby Joe Budwine accused petitioner of making a racial slur, i.e., "When I'm elected Chief of Police No N_ _ _ _ _ is going to be able to cross the tracks and

go shopping in Vinton." After Joe Budwine faked the confrontation at the basketball game, he made numerous statements in the parking lot after the game in which he stated he was going to harm plaintiff and his son (Ben Fox) in the future.

10.

On or about the following Wednesday after the said basketball game, ARTHUR PHILLIPS, while operating a TOWN OF VINTON police car, picked up Joe Budwine and brought him to the police department for purposes of filing a complaint against petitioner for Disturbing the Peace by Racial Slur.

11.

A formal complaint (offense report) of criminal conduct was prepared by TROY CARY under the direction of BILLY RAY VICE.

12.

BILLY RAY VICE caused the said offense report to be shown to third-persons.

13.

The said offense report did not result in format charges being tiled against petitioner because the said BILLY RAY VICE was first arrested by the FBI in connection with his actions as set forth herein.

14.

In the alternative to petitioner's allegations of vicarious liability on the part of THE TOWN OF VINTON, petitioner alleges that THE TOWN OF VINTON, TROY CARY, BILLY RAY VICE and ARTHUR PHILLIPS, are liable under 42 U.S.C.S.

§ 1983, which protects petitioner's rights, privileges and immunities as secured by our Constitution and laws.

15.

The actions of BILLY RAY ME, ARTHUR PHILLIPS and TROY CARY as outlined herein are a willful and gross abuse of power, all made possible by the power conferred upon them as policeman for THE TOWN OF VINTON.

16.

The rights, privileges and Immunities afforded petitioner by our Constitution and laws that were violated include, but are not limited to the following:

a) the right to seek public office:

b) the right to be free from extortion;

c) the right to be protected by unlawful interference by police;

d) the right to be protected by malicious abuse of process;

e) the right to not be slandered/defamed;

f) the right to Due Process;

g) the right to not be subjected to abuse of power; and

h) other violations to be proven at the trial of this matter.

17.

The said offense report that was prepared against petitioner was totally false in its allegations and was made with malice on the part of BILLY RAY VICE, ARTHUR PHILLIPS and TROY CARY.

18.

Petitioner has suffered and is entitled to recover reasonable sums for the following Items of damage as a direct result of the actions of the defendants, as outlined herein, to-wit:

a) violation of petitioner's rights, privileges and immunities as secured by our Constitution and laws;

b) past, present and future emotional distress;

c) past. present and future embarrassment;

d) past, present and future humiliation;

e) past, present and future damage to reputation;

f) punitive damages:

g) reasonable attorney's fees; and

h) other damages to be proven at the trial of this matter.

19.

The damages suffered herein by petitioner are sufficient to legally warrant a jury trial.

WHEREFORE, petitioner, RICKY D. FOX, prays that the defendants, BILLY RAY VICE, ARTHUR PHILLIPS' TROY CARY and THE TOWN OF VINTON be served with copies of this Petition and be duly cited to appear and answer same, and, after lapse of legal delays and due proceedings had, there be Judgment herein In favor of the petitioner, RICKY D. FOX, and against the defendants, BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY and THE TOWN OF VINTON, jointly and insolido, for such sums as may be reasonable under the circumstances of this case, together with legal interest thereon from the dale of judicial demand, attorney's fees and all costs, including court costs, of these proceedings.

Petitioner further prays that he be granted all further and different relief as the facts, law, and equity of this case require.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

* * *

NOTICE OF REMOVAL BASED ON FEDERAL QUESTION JURISDICTION

NOW INTO COURT, through undersigned counsel, comes defendant, THE TOWN OF VINTON, and with respect represents:

1.

On December 20, 2005, plaintiff Ricky D. Fox, filed a petition for damages in the 14th Judicial District Court, Parish of Calcasieu, under docket number 2005-005932, a copy of which is attached hereto as "Exhibit A."

2.

The original petition for damages filed by Ricky D. Fox in docket number 2005-005932 in the 14th Judicial District Court for Calcasieu Parish, Louisiana, sets forth that the Town of Vinton is "liable under 42 U.S.C.S. Section **1983**, which protects petitioner's rights, privileges and immunities as secured by our constitution and laws." (See Paragraph 14 of original petition for damages). Further, plaintiff sets forth in his original petition,

paragraph 16, that "the rights, privileges and immunities afforded petitioner by our constitution and laws that were violated include, but are not limited to the following:

A. The right to seek public office;

B. The right to be free from extortion;

C. The right to be protected by unlawful interference by police;

D. The right to be protected by malicious abuse of process;

E. The right not to be slandered/defamed;

F. The right to due process;

G. The right to not be subjected to abusive powers; and

H. Other violations to be proven at the trial of this matter."

3.

Petitioner seeks recovery of "reasonable sums for the following items of damage as a direct result of the actions of the defendants, as outlined herein to-wit:

A. Violation of petitioner's rights, privileges and immunities as secured by our constitution and law;"

(Paragraph 18 of original petition).

4.

Defendant, Town of Vinton, was served personally on December 27, 2005 with said original petition for damages.

5.

Plaintiff, Ricky D. Fox, is domiciled in the State of Louisiana and is, therefore, deemed to be a citizen of the United States of America for purposes of determining federal subject matter jurisdiction.

6.

Defendants, Billy Ray Vice and Troy Cary, are domiciled in the State of Louisiana and defendant, Arthur Phillips, is domiciled in the State of Texas and are all, therefore, deemed to be citizens of the United States of America for purposes of determining federal subject matter jurisdiction. Defendant, Town of Vinton, is a municipality located within the State of Louisiana.

7.

Appearer desires and is entitled to remove the above suit from the le Judicial District Court, Calcasieu Parish, Louisiana, to Federal Court, United States District Court for the Western District of Louisiana, pursuant to the provisions of 28 U.S.C. Section 1331 and Section 1441(a)(b).

8.

4.7

Upon filing of this Notice of Removal, counsel for appearer will give written notice to the plaintiff and will file a copy of the Notice of Removal with the Clerk of Court for the 14th Judicial District Court, Calcasieu Parish, Louisiana.

9

As of the date of this Notice of Removal, defendants, Troy Cary, Arthur Phillips and Billy Ray Vice, have been served With the original petition. Arthur Phillips was served by personal service on December 27, 2005, Troy Cary was served by personal service on December 27, 2005 and Billy Ray Vice was served by personal service on December 28, 2005. Appearer has secured the consent of the defendants, Troy Cary, Arthur Phillips and Billy Ray Vice, to this Notice of Removal.

WHEREFORE, appearer prays that the suit entitled "Ricky D. Fox versus Billy Ray Vice, Arthur Phillips, Troy Cary and the Town of Vinton," docket number 2005-005932 on the docket of the le Judicial District Court, Calcasieu Parish, Louisiana be removed to the United States District Court, Western District of Louisiana and that the 14th Judicial District Court, Calcasieu Parish, Louisiana, proceed no further therein unless the case is remanded.

Respectfully submitted,

STAMEY & MILLER, L.L.C.
Attorneys at Law
727 Second Street
Post Office Drawer 1288
Natchitoches, Louisiana 71458
(318) 352-4559

BY: s/J. Mark Miller
JOSEPH B. STAMEY - #17815
J. MARK MILLER - #25181
Attorneys for Town of Vinton

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

RICKY D. FOX	CIVIL ACTION NO: 06-CV-00135
VERSUS	
	JUDGE: MINALDI
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY, and THE TOWN OF VINTON	MAGISTRATE JUDGE: WILSON

* *

ANSWER TO PETITION FOR DAMAGES

Defendant, Arthur Phillips ("Phillips"), in answer to Plaintiffs Petition for Damages ("Petition"), denies each and every allegation contained therein except as specifically admitted below. And now, further answering:

FIRST DEFENSE

The Complaint fails to state a claim against Phillips upon which relief can be granted.

SECOND DEFENSE

Phillips is entitled to the defense of qualified immunity.

THIRD DEFENSE

In the alternative, in the event Phillips is found liable under any theory of state law, Phillips asserts that the sole and proximate cause of any damages to plaintiff was plaintiffs own fault, and that as a result, any award to plaintiff is barred or should be reduced in proportion to the extent of that fault.

FOURTH DEFENSE

In the alternative, in the event Phillips is found liable under any theory of state law, Phillips asserts that the sole and proximate cause of any damages to plaintiff was the fault of third parties for whom Phillips is not responsible, and that as a result, Phillips is responsible only for his degree of fault, if any.

FIFTH DEFENSE

In the further alternative, in the event that Phillips is found liable under any theory of state law, Phillips asserts the limitation of liability contained in La R.S. 13:5101, et seq.

SIXTH DEFENSE

Phillips pleads the right to recover attorney's fees, interest and costs, pursuant to U.S.C. §1998, as a prevailing party under 42 U.S.C. §1983.

SEVENTH DEFENSE

Phillips reserves the right to assert additional defenses in the event that discovery shows that additional defenses are warranted.

EIGHTH DEFENSE

AND NOW, answering the individual allegations of the Petition for Damages, Phillips states:

The allegations of Paragraph 1 of the Petition are denied for lack of information sufficient to justify a belief as to the truth thereof, except as to the allegation in Paragraph 1(B), that Phillips has been named as a defendant and is domiciled in Jefferson County, Texas. Phillip denies that he is liable to plaintiff for any reason or in any amount whatsoever.

2.

The allegations of Paragraph 2 of the Petition are denied for lack of information

sufficient to justify a belief as to the truth thereof.

3.

The allegations of Paragraph 3 of the Petition are admitted.

4.

The allegations of Paragraph 4 of the Petition are admitted.

5.

The allegations of Paragraph 5 of the Petition contain legal conclusions, and are therefore denied for lack of information sufficient to justify a belief as to the truth thereof.

6.

The allegations of Paragraph 6 of the Petition are denied for lack of information sufficient to justify a belief as to the truth thereof.

7.

The allegations of the first sentence of Paragraph 7 of the Petition are denied for lack of information sufficient to justify a belief as to the truth thereof.

8.

The allegations of Paragraph 8 of the Petition are denied for lack of information sufficient to justify a belief as to the truth thereof.

9.

The allegations of Paragraph 9 of the Petition are denied as written.

10.

The allegations of Paragraph 10 of the Petition are denied as written. Phillips admits that Joe Budwine was picked up and transported to the Town of Vinton police department, pursuant to

orders received by Phillips from his supervisor, Billy Ray Vice.

11.

The allegations of Paragraph 11 of the Petition are denied for lack of information sufficient to justify a belief as to the truth thereof.

12.

The allegations of Paragraph 12 of the Petition are denied for lack of information sufficient to justify a belief as to the truth thereof.

13.

The allegations of Paragraph 13 of the Petition are denied for lack of information sufficient to justify a belief as to the truth thereof.

14.

The allegations of Paragraph 14 of the Petition are denied.

15.

The allegations of Paragraph 15 of the Petition are denied.

16.

The allegations of Paragraph 16 of the Petition are denied.

17.

The allegations of Paragraph 17 of the Petition are denied.

18.

The allegations of Paragraph 18 of the Petition are denied.

19.

The allegations of Paragraph 19 of the Petition are denied.

WHEREFORE, Arthur Phillips prays:

1. That this answer be deemed good and sufficient, and after due proceedings, there be judgment rendered in his favor and against plaintiff, dismissing plaintiffs claims, with prejudice and at plaintiffs costs;

2. That Phillips recover all costs of this action, including reasonable attorneys' fees, pursuant to 42 U.S.C. §1988;

3. For all other and further relief as this Court may deem appropriate.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

RICKY D. FOX	CIVIL ACTION NO: 06-CV-00135
VERSUS	JUDGE: MINALDI
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY, AND THE TOWN OF VINTON	MAGISTRATE JUDGE: WILSON

* *

ANSWER AND AFFIRMATIVE DEFENSES TO PETITION FOR DAMAGES

Defendant, Troy Cary ("Cary"), in response to Plaintiffs Petition for Damages, denies each and every allegation stated therein, except as those specifically admitted below. Further answering, Cary says:

FIRST DEFENSE

The plaintiffs' complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Cary is entitled to the defense of qualified immunity.

THIRD DEFENSE

Plaintiffs damages, if any, were not proximately caused by Cary.

FOURTH DEFENSE

In the alternative, in the event Cary is found liable under any theory of state law, Cary asserts that the sole and proximate cause of any damages to plaintiff was plaintiffs own fault, and that as a result, any award to plaintiff is barred or should be reduced in proportion to the extent of that fault.

FIFTH DEFENSE

In the alternative, in the event Cary is found liable under any theory of state law, Cary asserts that the sole and proximate cause of any damages to plaintiff was the fault of third parties for whom Cary is not responsible, and that as a result, Cary is responsible only for his degree of fault, if any.

SIXTH DEFENSE

In the further alternative. In the event that Cary is found liable under any theory of state law, Cary asserts the limitations of liability contained in La. R.S. 13;5101, *et seq*.

SEVENTH DEFENSE

Plaintiff is obliged to mitigate his damages with respect to any claim for monetary relief As such, these claims should be barred, or in the alternative reduced, if plaintiff failed to mitigate his damages.

EIGHTH DEFENSE

Cary pleads the right to recover attorney's fees, interest and costs, pursuant to U. S .C. Section 1998, as a prevailing party under 42 U.S.C. Section 1983.

NINTH DEFENSE

Cary reserves the right to assert additional defenses in the event That discovery shows that additional defenses are warranted.

AND NOW, in answering the individual allegations of the Petition for Damages, Cary avers as follows:

1.

The allegations of Paragraph 1 of the petition are denied for lack of sufficient information to justify a reasonable belief therein, except as to the allegation contained in Paragraph 1C). Cary admits that he has been named a defendant and that he resides in Jefferson Davis Parish. Cary denies that he is liable to plaintiff for any reason or in any amount whatsoever.

2.

The allegations of Paragraph 2 of the petition are denied for lack of sufficient information to justify a reasonable belief therein

3.

The allegations of Paragraph 3 of the petition are admitted.

4.

The allegations of Paragraph 4 of the petition are admitted.

The allegations of Paragraph 5 of the petition contain legal conclusions, and as such, are denied for lack of sufficient information to justify a reasonable belief therein.

6.

The allegations of Paragraph 6 of the petition are denied for lack of sufficient information to justify a reasonable belief therein.

7.

The allegations of Paragraph 7 of the petition are denied for lack of sufficient information to justify a reasonable belief therein.

59

8.

The allegations of Paragraph 8 of the petition are denied for lack of sufficient information to justify a reasonable belief therein.

9.

The allegations of Paragraph 9 of the petition are denied as written.

10.

The allegations of Paragraph 10 of the petition are denied for lack of sufficient information to justify a reasonable belief therein.

11.

The allegations of Paragraph) 1 of the petition are denied as written. Cary admits that an offense report was prepared pursuant to the orders of his supervisor, Billy Ray Vice.

12.

The allegations of Paragraph 12 of the petition are denied for lack of sufficient information to justify a reasonable belief therein.

13.

The allegations of Paragraph 13 of the petition are denied for lack of sufficient information to justify a reasonable belief therein.

14.

The allegations of Paragraph 14 of the petition are denied.

15.

The allegations of Paragraph 15 of the petition are denied.

16.

The allegations of Paragraph 16 of the petition are denied.

17.

The allegations of Paragraph 17 of the petition are denied.

18.

The allegations of Paragraph 18 of the petition are denied.

19.

To the extent that a response is required to the prayer for relief in plaintiffs petition, the allegations contained therein are denied.

WHEREFORE, Cary respectfully prays

1. That this answer be deemed good and sufficient, and after due proceedings, there be judgment rendered in his favor and against plaintiff dismissing plaintiffs

claims, with prejudice and at plaintiff's costs;

2. That Cary recover all costs of this action, including reasonable attorneys fees, pursuant to 42 U.S.C. Section 1988.

3. For all other and further relief that this Court may deem appropriate.

Respectfully submitted,

J. Thomas (La. Bar Roll No. 22635)
700 North 10th Street, Suite 440
Post Office Box 4327
Baton Rouge, Louisiana 70821
(225) 344-5001
Attorney for Troy Cary

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

RICKY D. FOX	CIVIL ACTION NO: 06-CV-00135
VERSUS	
	JUDGE: MINALDI
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY, AND THE TOWN OF VINTON	MAG. JUDGE: WILSON

ANSWER

NOW INTO COURT, through undersigned counsel, come and appear the TOWN OF VINTON, who in response to plaintiffs original complaint respectfully represents the following:

1.

Defendant herein generally denies each and every, all and singular, the material allegations in the plaintiffs complaint and state that the same are not true in whole or in part, and demands strict proof thereof.

II.

Defendant further submits the following defense:

FIRST DEFENSE

The plaintiffs complaint fails to state a claim against defendant herein upon which relief can be granted.

Defendant now responds as follows to the separately numbered paragraphs of the complaint:

The Town of Vinton admits that it has been named as a defendant in this action, all other allegations contained in Paragraph 1 of plaintiffs complaint are denied as written.

2.

The allegations contained in Paragraph 2 of plaintiffs complaint are admitted.

3.

Defendant admits that Billy Ray Vice is the former Chief of Police of the Town of Vinton; all other allegations contained in Paragraph 3 of plaintiffs complaint are denied for lack of sufficient information to justify a belief therein.

4.

Defendant admits that Arthur Phillips is a police officer for the Town of Vinton and that Troy Cary is a former member of the Vinton Police

Department; all other allegations contained in Paragraph 4 of plaintiffs complaint are denied as written.

5.

The allegations contained in Paragraph 5 of plaintiffs complaint are denied.

6.

The allegations contained in Paragraph 6 of plaintiffs complaint are denied as written.

7.

The allegations contained in Paragraph 7 of plaintiffs complaint are denied as written.

8.

The allegations contained in Paragraph 8 of plaintiffs complaint are denied for lack of sufficient information to justify a belief therein.

9.

The allegations contained in Paragraph 9 of plaintiffs complaint are denied for lack of sufficient information to justify a belief therein.

10.

The allegations contained in Paragraph 10 of plaintiffs complaint are denied as written.

11.

The allegations contained in Paragraph 11 of plaintiffs complaint are denied as written.

12.

The allegations contained in Paragraph 12 of plaintiffs complaint are denied for lack of sufficient information to justify a belief therein.

13.

The allegations contained in Paragraph 13 of plaintiffs complaint are denied as written.

14.

The allegations contained in Paragraph 14 of plaintiffs complaint are denied.

15.

The allegations contained in Paragraph 15 of plaintiffs complaint are denied.

16.

The allegations contained in Paragraph 16 of plaintiffs complaint are denied.

17.

The allegations contained in Paragraph 17 of plaintiffs complaint are denied for lack of sufficient information to justify a belief therein.

18.

The allegations contained in Paragraph 18 of plaintiffs complaint are denied.

19.

The allegations contained in Paragraph 19 of plaintiffs complaint are denied.

IV.

Defendant further asserts the following additional defenses:

SECOND DEFENSE

Further answering, defendant herein avers that the Town of Vinton acted reasonably, in good faith, prudently and with probable cause, and obeyed all laws of the United States of America, State of Louisiana and all ordinances of the Town of Vinton, Parish of Calcasieu, State of Louisiana and the United States of America.

THIRD DEFENSE

Further answering, defendant specifically avers that the Town of Vinton is not legally responsible to plaintiff as a result of any intentional act, act of negligence or legal fault which caused or contributed to the incident and alleged damages which are at issue in this litigation.

FOURTH DEFENSE:

Defendant further avers that the sole cause of the incident and any alleged damages, if any, which plaintiff contends to have sustained, or alternatively, a contributing cause of the incident and any alleged damages, was the intentional acts, fault and/or assumption of risk of third parties for whom the Town of Vinton is not legally or contractually responsible, which is plead as a complete bar to recovery or partial bar to recovery by the plaintiff, and the plaintiffs recovery against defendant herein should be mitigated and reduced accordingly. Alternatively, and only in the event this Honorable Court should find that the damages alleged to have been sustained by the plaintiff resulted or partially resulted from any intentional act, negligence, fault, or breach of duty on the part of defendant herein, which is specifically denied, Town of Vinton' avers that the sole cause of the incident or alternatively, a contributing cause of the incident was the intentional acts, fault and/or assumption of risk of third patties, which is plead as a complete bar to recovery or partial bar to recovery by the plaintiff, and the plaintiffs recovery against defendants should be mitigated and reduced accordingly.

FIFTH DEFENSE

Alternatively, defendant specifically denies that petitioner's alleged damages were caused by or related to the incident which is the subject of plaintiffs petition for damages.

SIXTH DEFENSE

Alternatively, and only in the event this Honorable Court should find that the damages alleged to have been sustained by the plaintiff resulted from any legal fault on the part of defendant herein, which is specifically denied, it is asserted that the plaintiff failed to take reasonable steps to mitigate his alleged damages, which failure to mitigate is specifically plead in bar or mitigation of the plaintiffs recovery.

SEVENTH DEFENSE

Alternatively, in the event any fault or negligence is found on the part of the defendant herein, that said fault and negligence was not a legal or factual cause of the incident or damages described in plaintiffs complaint.

EIGHTH DEFENSE

Further answering, defendant herein specifically pleads the limitation on damages contained in La. R.S. 13:5106, the limitation on legal interest and court costs in accordance with La. R.S. 13:5112, including but not limited to La. R.S. 13:5112.9, the application of La. R.S. 13:5114, the limitations of liability for public bodies under La. R.S. 9:2798.1 and 9:2800 and Civil Code Articles 2323 and 2324.

NINTH DEFENSE

Defendant further pleads the application of the defense of absolute and/or qualified immunity;

defendant herein avers that the Town of Vinton is entitled to absolute and/or qualified immunity, as any act taken by the Town of Vinton was done or taken in good faith, and that the acts done or taken were not in violation of any clearly established statutory or constitutional rights of which defendant herein knew or should have known.

TENTH DEFENSE

Defendant reserves the right to recover attorney's fees, interest and costs, pursuant to 42 U.S.C Section 1998, as a prevailing a party pursuant to 42 U.S.C. 1983.

ELEVENTH DEFENSE

Defendant herein reserves the right to file additional Answers, incidental demands, incidental actions, and affirmative defenses such as further discovery in this matter may warrant and require.

WHEREFORE, defendant, TOWN OF VINTON, prays that after due proceedings are held there be judgment herein in favor of the TOWN OF VINTON and against the plaintiff, dismissing plaintiffs demands at plaintiffs cost.

Defendant prays for recovery of all costs of this action, including reasonable attorneys' fees, pursuant to 42 U.S.C. 1988.

Defendant further prays for any and all orders necessary in the premises and for full, general and equitable relief.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

RICKY D. FOX	CIVIL ACTION NO: 06-CV-00135
VERSUS	JUDGE: MINALDI
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY, AND THE TOWN OF VINTON	MAGISTRATE JUDGE: WILSON

* *

ANSWER AND AFFIRMATIVE DEFENSES ON BEHALF OF BILLY RAY VICE

NOW INTO COURT through undersigned counsel, comes Defendant, BILLY RAY VICE ("Vice"), who, in response to plaintiffs Complaint for Damages denies each and every allegation contained therein except as specifically admitted below. And now, further answering:

FIRST DEFENSE

The Complaint fails to state a claim against Vice upon which relief can be granted.

SECOND DEFENSE

Vice is entitled to the defense of qualified immunity.

THIRD DEFENSE

AND NOW, answering the individual allegations of the Complaint for Damages, Vice states:

The allegations of Paragraph 1 of the Petition are denied for lack of information sufficient to justify a belief therein, except that Vice admits his majority status and domicile as alleged in Paragraph I (A).

The allegations of Paragraph 2 of the Petition state legal conclusions requiring no answer; however, out of an abundance of caution, the allegations of Paragraph 2 are denied for lack of information sufficient to justify a belief therein.

Vice admits that he was at one time the Chief of Police of the Town of Vinton; the remainder of Paragraph 3 is denied as written for lack of information sufficient to justify a belief therein.

4.

Vice admits that Arthur Phillips and Troy Cary are, or have been, policemen for the Town of Vinton; the reminder of Paragraph 4 is denied as written for lack of information sufficient to justify a belief therein.

5.

The allegations of Paragraph 5 of the Petition contain legal conclusions requiring no answer; however, out of an abundance of caution, the

allegations of Paragraph 5, are denied for lack of information sufficient to justify a belief therein.

6.

The allegations of Paragraph 6 of the Petition are denied as written for lack of information sufficient to justify a belief therein.

7.

Vice admits that at one time he was an announced candidate for the position of Chief of Police of the Town of Vinton; the remainder of Paragraph 7 is denied as written for lack of information sufficient to justify a belief therein.

8.

The allegations of Paragraph 8 of the Petition are denied.

9.

The allegations of Paragraph 9 of the Petition are denied.

10.

The allegations of Paragraph 10 of the Petition are denied.

11.

The allegations of Paragraph 11 of the Petition are denied as written for lack of information sufficient to justify a belief therein, except to

specifically deny that Vice directed the preparation of a "complaint (offense report) of criminal conduct" against Plaintiff as apparently alleged in this Paragraph.

12.

The allegations of Paragraph 12 of the Petition are denied.

13.

The allegations of Paragraph 13 of the Petition are denied for lack of information sufficient to justify a belief therein.

14.

The allegations of Paragraph 14 state legal conclusions requiring no answer; however, out of an abundance of caution, the allegations of Paragraph 14 are denied, and Vice specifically denies liability to Plaintiff.

15.

The allegations of Paragraph 15 of the Petition are denied.

16.

The allegations of Paragraph 16 state legal conclusions requiring no answer; however, out of an abundance of caution, the allegations of Paragraph 16 are denied, and Vice specifically denies that he

has violated any right of Plaintiff and specifically denies liability to Plaintiff.

17.

The allegations of Paragraph 17 of the Petition are denied.

18.

The allegations of Paragraph 18 of the Petition are denied; Vice specifically denies any

liability to Plaintiff and specifically denies that Plaintiff has suffered any damages.

19.

The allegations of Paragraph 19 of the Petition are denied.

FOURTH DEFENSE

The sole and proximate cause of any damages to plaintiff was Plaintiffs own fault, and that as a result, any award to Plaintiff is barred or should be reduced in proportion to the extent of the fault.

FIFTH DEFENSE

In the alternative, the sole and proximate cause of any damages to Plaintiff was the fault of third parties for whom Vice is not responsible, and that as a result, Vice is responsible only for his degree of fault, if any.

SIXTH DEFENSE

In the event that Vice is found liable under any theory of state law, Vice asserts the limitation of liability contained in La R.S. 13:5101, *et seq*.

SEVENTH DEFENSE

Plaintiff has suffered no damages, having suffered no compensable injury or damage, and having been elected Chief of Police of the Town of Vinton in the election which is the subject of his Complaint.

EIGHTH DEFENSE

Vice pleads the right to recover attorney's fees, interest and costs, pursuant to 42 U.S.C. § 1988.

WHEREFORE, Billy Ray Vice prays that this answer be deemed good and sufficient, and after due proceedings, there be judgment rendered in his favor and against plaintiff, dismissing plaintiffs claims, with prejudice and at plaintiffs costs, that Vice be awarded all costs incurred in this action, and that the Court grant such other legal or equitable relief as is appropriate.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

RICKY D. FOX	:	CIVIL ACTION NO. 06-0135
VERSUS	:	JUDGE MINALDI
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY and THE TOWN OF VINTON	:	MAGISTRATE JUDGE WILSON

MOTION FOR DISMISSAL WITHOUT PREJUDICE

Ricky D. Fox ("plaintiff"), hereby moves and requests that all claims against defendant, Arthur Phillips, be dismissed, without prejudice, and that the Court issue a "Judgment of Dismissal Without Prejudice," with plaintiff reserving all rights to proceed against all other named defendants.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX	DOCKET NO. 06-135
VS	JUDGE MINALDI
/	
BILLY RAY VICE, ET AL	MAGISTRATE JUDGE WILSON

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST BILLY RAY VICE AND THE TOWN OF VINTON

Plaintiff, RICKY D. FOX, respectfully moves this Honorable Court for summary judgment in his favor and against BILLY RAY VICE and the TOWN OF VINTON on the issue of liability as it relates to Plaintiffs claim for damages for extortion. Plaintiff contends there is no material issue of fact as regards the liability of BILLY RAY VICE and the TOWN OF VINTON for extortion in connection with that certain anonymous letter mailed to RICKY D. FOX, in or about the month of January, 2005, by BILLY RAY VICE, which letter threatened to take certain actions against RICKY D. FOX if he ran for the position of chief of police for the Town of Vinton.

In support of this motion, Plaintiff is filing a statement of material facts and supporting memorandum.

RESPECTFULLY
SUBMITTED:

STEVEN BROUSSARI, NO. 3518
RANDALL E. HART, NO 23119
BROUSSARD & HART, L.L.C.
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX	DOCKET NO: 06-135
VS.	JUDGE MINALDI
BILLY RAY VICE, ET AL	MAGISTRATE JUDGE: WILSON

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST BILLY RAY VICE AND THE TOWN OF VINTON ON THE ISSUE OF LIABILITY FOR EXTORTION CLAIM BACKGROUND

At all relevant times herein, BILLY RAY VICE (hereinafter referred to at times as "VICE") was the interim appointed Chief of Police for the TOWN OF VINTON, (hereinafter referred to as "VINTON"). Further, VICE and RICKY D. FOX (hereinafter referred to at times as "FOX") were announced candidates for the position of chief of police for the VINTON for the election scheduled for April 2, 2005.

In or about the month of January, 2005, VICE caused an anonymous letter, attached and marked as "Exhibit 1" to be sent to Plaintiff, FOX, threatening to take certain actions against FOX if FOX ran for the position of Chief of Police for VINTON. FOX received the letter via the United States mail at his home in Vinton, Louisiana.

FOX filed suit against VICE and VINTON for damages as a result of the extortion letter. It is noted that the suit names other Defendants and states other causes of action, but this Motion For Summary Judgment is limited to the liability of VICE and VINTON in connection with their liability for the extortion letter. There are no allegations that anyone other than VICE participated in the extortion letter.

Further, as seen below, the doctrines of res judicata and collateral estoppel as a result of VICE'S extortion conviction operate to accord preclusive effect to the liability of VICE as concerns the facts surrounding the extortion charge. Simply stated, VICE'S conviction for extortion is sufficient in and of itself to invoke liability against VICE in this civil action as concerns the extortion charge.

As a result of the anonymous extortion letter, VICE was charged with extortion by the Calcasieu Parish District Attorney's Office and was convicted of said charge in the 14th Judicial District Court, Parish of Calcasieu, State of Louisiana, on April 13, 2007. A certified copy of the *Indictment* is attached and marked as "Exhibit 2." A certified copy of the jury's verdict is also attached and marked as "Exhibit 3." As will be seen more fully below, the actions of VICE in this matter render VINTON vicariously liable for VICE'S actions.

LAW AND ARGUMENT

Vice's Liability

The Third Circuit Court of Appeal of Louisiana has held that a conviction in a criminal proceeding serves as res judicata as concerns a civil proceeding arising out of the same operative facts. *Johnson v. I-A/polite*, 05-598 (La.App. 3 Cir. 12/30/05), 918 So.2d 1121. Further, the Third Circuit Court of Appeal of Louisiana has specifically held that Federal common law on res judicata and collateral estoppel operates to bar one convicted in a criminal proceeding from re-litigating questions distinctly put in issue and directly determined in the criminal prosecution. *McCollough v. Dauzat*, et al, 98-1293 (La.App. 3 Cir. 3/3/99), 736 So.2d 914.

The United States Supreme Court has specifically held that a state court criminal conviction serves as res judicata and collateral estoppel so as to relieve the parties of the burden of establishing the same issues from the criminal conviction in a subsequent federal court civil proceeding. *Allen v. McCurry*, 449 U.S. 90 (1980).

Plaintiff, FOX, was a witness at the trial wherein VICE was convicted of extortion. FOX'S Affidavit, attached and marked as "Exhibit 4," makes it clear that VICE was convicted of extortion in connection with the same extortion letter as described in Plaintiff's Petition for Damages. Further, FOX'S affidavit identifies the attached extortion letter as the letter FOX received in the United States mail at his home in Vinton, Louisiana.

Vicarious Liability of the Town of Vinton

The case of *Koziol v. Hanna*, 107 F.Supp.2d 170 (N.D. N.Y. 2000) involved a claim of vicarious liability against a municipality based on a gag order issued by the mayor that sought to restrain the speech of all employees of the city. The court stated that in order for the city to be vicariously liable for the acts of the mayor, the Plaintiff must prove that the mayor's actions amounted to a policy or practice the municipality had adopted. The court noted that the policy must be officially adopted and promulgated by tha. body's officers. The decisions of officials whose acts or edicts may fairly be said to represent official policy may lead to municipal liability. The court went on to hold that the mayor of the city qualified as a "policy making authority" such that the city could be vicariously liable for his actions in issuing the gag order. It should be noted that the Koziol case, while not a trial on the merits, did find/hold that the plaintiff had stated a valid claim against the city for vicarious liability based on the mayor's alleged violation of the plaintiffs civil rights.

In the case of *Roma Construction Co. v. Russo* 96 F.3d 566 (1st Cir. 1996), the court set forth a two part requirement for maintaining a "1983" action against a municipality grounded upon unconstitutional municipal custom. First, the custom or practice must be attributable to the municipality. That is, it must be so well settled and wide spread that the policy making officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice. Second, the custom must have been the cause of and the moving force behind the deprivation of

constitutional rights. The court went on to state that an unconstitutional policy or custom may be inferred from a single decision or act, but the isolated action must be taken by a municipal official with final policy making authority in the relevant area of the city's business. In this case the mayor was extorting bribery payments from developers in order for their development to be approved. The court said that the actions of the mayor in coercing these bribes were sufficient for a trier of fact to infer unconstitutional policy or custom with respect to the town's government.

In the case sub judice, it seems clear VICE was acting in the area of authority of the Chief of Police when he threatened FOX with the anonymous letter. VICE, as acting/appointed Chief of Police, was the highest ranking authority with the town's police department. The fact that his actions were illegal in no way takes them out of the arena of acts for which vicarious liability can be imposed on the Town of Vinton.

CONCLUSION

It is respectfully submitted that the state court conviction for extortion, based on the principles of res judicata and collateral estoppel, relieve Plaintiff from having to prove the same operative facts relating to the extortion in this civil case.

It is further respectfully submitted that because VICE in his position as acting Chief of Police caused this anonymous letter to be sent to FOX, the TOWN OF VINTON is vicariously liable

for VICE'S illegal actions. VICE, as acting Chief of Police, next to the mayor, was the highest ranking authority with the TOWN OF VINTON; certainly VICE'S position would be the type of "policy making authority" that would impose vicarious liability on a city for unconstitutional actions.

It is further respectfully submitted that there is no material issue of fact as concerns this Motion For Summary Judgment, and that Plaintiff is entitled to judgment as a matter of law, imposing liability upon BILLY RAY VICE and the TOWN OF VINTON as concerns damages flowing from the extortion letter.

In the alternative, Plaintiff prays for summary judgment against VICE only.

RESPECTFULLY SUBMITTED BY:

By: _____

STEVEN BROUSSARD, No. 3518
RANDALL E. HART, No. 23119
BROUSSARD & HART, L.L.C.
1301 Common Street
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Phone: (337) 439-2450
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ATTORNEY FOR PLAINTIFF, RICKY D. FOX

FOURTEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF CALCASIEU

STATE OF LOUISIANA

STATE OF LOUISIANA
VERSUS
BILLY RAY VICE
W/M, DOE: 6/18/46

FILED 12-8-2005

INDICTMENT

EXTORTION

MALFEASANCE IN OFFICE

FILING FALSE PUBLIC RECORDS

***

The Grand Jury of the Parish of Calcasieu, State of Louisiana, charges that on or about BETWEEN DECEMBER 10, 2004 AND JUNE 30, 2005, at and in the Paris, District and State aforesaid, BILLY RAY VICE COMMITTED THE OFFENSE OF EXTORTION
MALFEASANCE IN OFFICE AND FILING FALSE PUBLIC RECORDS
Violating L.S.A. R.S. 14:66, 14:134 AND 14:133, in that

COUNT
HE DID THREATEN TO EXPOSE OR IMPUTE ANY DEFORMITY OR DISGRACE TO RICKY FOX OR ANY MEMBER OF HIS FAMILY OR TO ANY PERSON HELD DEAR TO HIM, WITH THE

INTENT TO OBTAIN ANYTHING OF VALUE OR ANY ACQUAINTANCE, ADVANTAGE, OR IMMUNITY OF ANY DESCRIPTION

COUNT II:
HE BEING A PUBLIC OFFICIAL, DID INTENTIONALLY REFUSE OR FAIL TO PERFORM ANY DUTY LAWFULLY REQUIRED OF HIM, AS SUCH OFFICER OR EMPLOYEE, OR DID INTENTIONALLY PERFORM ANY SUCH DUTY IN AN UNLAWFUL MANNER,

COUNT III:
HE DID UNLAWFULLY FILE A FRAUDULENT LOUISIANA MOTOR VEHICLE ACCIDENT REPORT,

Contrary to the law of the State of Louisiana and against the peace and dignity of the same.

* * *

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

RICKY D. FOX	:	CIVIL ACTION NO. 06-0135
VERSUS	:	JUDGE MINALDI
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY and THE TOWN OF VINTON	:	MAGISTRATE JUDGE WILSON

JUDGMENT OF DISMISSAL WITHOUT PREJUDICE

Upon motion, Ricky D. Fox ("plaintiff") dismisses all claims against defendant, Arthur Phillips, retaining the right to proceed against all other named defendants.

IT IS ORDERED, ADJUDGED AND DECREED that any and all claims and/or causes of action asserted by plaintiff, Ricky D. Fox, and against defendant, Arthur Phillips, be and are hereby dismissed, without prejudice, with plaintiff reserving all rights to proceed against all other named defendants.

Lake Charles, Louisiana, this ___ day of _____ 2007.

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX	CIVIL ACTION NO: 06-CV-00135
VERSUS	JUDGE: MINALDI
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY, AND THE TOWN OF VINTON	MAG. JUDGE: WILSON

MEMORANDUM OF BILLY RAY VICE IN OPPOSITION TO PARTIAL MOTION FOR SUMMARY JUDGMENT

INTRODUCTION.

This memorandum is being filed on behalf of Billy Ray Vice in opposition to a Partial Motion For Summary Judgment against Billy Ray Vice and The Town of Vinton on the issue of liability for extortion. Simply stated, plaintiff takes the position that the State Court conviction of Mr. Vice for extortion relieves plaintiff from having to prove the same operative facts relating to the alleged extortion in the civil case under the principles of res judicata and collateral estoppel. Plaintiffs position that Vice's conviction for extortion is sufficient in and of itself to invoke liability against Vice in the civil action is faulty.

First and foremost, the conviction referenced is not final and Mr. Vice is well within his delays for appeal. (See Exhibit A) Second, even if the criminal conviction was final and appeal delays exhausted, the criminal conviction does not automatically serve as res judicata or collateral estoppel so as to relieve the plaintiff from establishing his burden of proof in this federal court civil proceeding. Third, even if the Court were to apply res judicata or collateral estoppel, the plaintiff has failed to prove that Billy Ray Vice was acting under color of state law.

Billy Ray Vice's position herein in opposition to plaintiffs Motion For Partial Summary Judgment is, in large measure, the same as The Town of Vinton. The memorandum is filed by the Town of Vinton is, with the permission of its counsel, adopted in substantial part by Billy Ray Vice as follows:

PROCEDURAL BACKGROUND

This is a civil rights action brought by plaintiff, Ricky D. Fox, brought pursuant to 42 U.S.C. 1983. Fox has set forth in his original complaint actions against the prior chief of police, Billy Ray Vice, and two police officers employed with the Town of Vinton, namely Arthur Phillips and Troy Cary, as well as an action against the Town of Vinton. Subsequently, plaintiff has voluntarily dismissed his action against defendant, Arthur Phillips. Plaintiff sets forth allegations in his complaint that Billy Ray Vice sent an anonymous letter to plaintiff extorting the plaintiff if he ran for the position of chief of police for the Town of Vinton. Further, the complaint alleges that Billy Ray Vice

and the two officers conspired, directed and orchestrated a confrontation between the plaintiff and a private citizen at a high school basketball game whereby plaintiff was accused of making racial slurs. Plaintiff further alleges that an offense report was prepared at the direction of Billy Ray Vice regarding the complaint of the private citizen at the high school basketball game.

Plaintiff specifically sets forth that the defendants, are liable under 42 U.S. C.A. Section 1983 which protects petitioner's rights, privileges and immunities as secured by the Constitution and laws. Plaintiff alleges that Billy Ray Vice, Arthur Ray Phillips and Troy Cary violated plaintiffs constitutional by the power conferred upon them as policemen of the Town of Vinton. Ultimately, plaintiff alleges that his rights, privileges and immunities afforded under the Constitution and laws were violated as follows:

A. The right to seek public office;

B. The right to be free from extortion;

C. The right to be protected by unlawful interference by police;

D. The right to be protected by malicious abuse of process;

E. The right to not be slandered/defamed;

F. The right to due process;

G. The right to not be subject to abuse of power;

H. Other violations to be proven at the trial of this matter.

Plaintiff alleges that the Town of Vinton is vicariously liable for the acts of its employees, Billy Ray Vice, Arthur Phillips and Troy Cary. Plaintiff seeks damages as well as attorney fees in regard to the Section 1983 claim.

FACTUAL BACKGROUND

In support of his Motion for Summary Judgment, plaintiff has merely submitted as evidence the following:

1. Indictment against Billy Ray Vice for extortion, malfeasance in office and filing false public records;
2. Transcript evidencing that a jury did find Billy Ray Vice guilty of extortion on April 13, 2007;
3. A copy of the "extortion letter" and envelope;
4. An affidavit from Ricky D. Fox indicating that the attached anonymous letter was received by Ricky Fox at his residence by U.S. Mail.

Ultimately, plaintiff seeks to have the Court determine that as a matter of law the criminal jury conviction of extortion should serve as res judicata in regard to the finding that Billy Ray Vice was guilty of the crime of extortion as set forth LSA-R.S. 14:66 or that defendants should be collaterally estopped from defending that allegation in the civil matter.

SUMMARY JUDGMENT STANDARD

Under Fed.R.Civ.P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" if it may affect the outcome of the suit under governing law. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed..2d 202 (1986). An issue is "genuine" if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *Id.* The court must "review the facts drawing all references most favorable to the party opposing the motion." *Reid vs. State Farm Mutual Auto. Insurance Co.*, 874 F2d 577, 578 (5th Cir. 1986).

The moving party bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. vs. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L. Ed.2d 265 (1986); *Lawrence vs. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309 (5th Cir. 1999). The moving party need not produce evidence to negate the elements of the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325; *Lawrence*, 163 F.3d at 311.

Once the moving party carries its initial burden, the burden then falls upon the non-moving

party to demonstrate the existence of a genuine issue of material fact. *Matsushita Elec.Indus. Co. vs. Zenith Radio Corp.*, 475 U.S. 574, 584-88,106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). The non-moving party "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace vs. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (citations omitted). This burden is not satisfied with some metaphysical doubt as to the material facts, or by a mere scintilla of evidence. *Little vs. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5td Cir. 1994) (citations omitted). In the absence of any proof, the court will not assume the non-moving party could or would prove the necessary facts. *Id.*

Pursuant to Local Rule 56.1, the moving party shall file a statement of material facts as to which it contends there is no genuine issue to be tried. Local Rule 56.2 requires that a party opposing the motion for summary judgment set forth a "short and concise statement of the material facts as to which there exists a genuine issue to be tried." All material facts set forth in the statement required to be served by the moving party "will be deemed admitted, for purposes of the motion, unless controverted as required by this rule." Local Rule 56.2.

LAW AND ARGUMENT

Y. Criminal Jury Conviction As Res Judicata/Collateral Estoppel

Plaintiff sets forth that the United States Supreme Court has specifically held that a state

court criminal conviction serves as res judicata and collateral estoppel so as to relieve the parties of the burden of establishing the same issues from the criminal conviction in a subsequent federal court civil proceeding. *Allen vs. McCurry*, 449 U.S. 90 (1980). This summation of the law by plaintiff fails to recognize that the doctrine of res judicata and collateral estoppel does not become imposed until their exists a final judgment. Thus, the mere finding by the jury of a verdict of guilty does not impose the principles of res judicata and collateral estoppel.

The cases cited in support of plaintiffs Motion for Summary Judgment distinctly speak of the doctrine of res judicata and collateral estoppel as being applicable to final judgments. Further, the United States Fifth Circuit Court of Appeal has specifically addressed this issue in *Brister vs. Parish of Jefferson, State of Louisiana*, 747 F. 2d 1019. The Fifth Circuit recognized that the state court judgment had been appealed to the Louisiana Appellate Courts at the time that the United States District Court granted a Summary Judgment basing its decision on res judicata principles. The Fifth Circuit vacated the United States District Court judgment on the basis that "the state court judgment was not yet final for res judicata purposes" because the state court judgment was on appeal and was not a final judgment. Thus, plaintiff must submit evidence showing that the criminal conviction for extortion against Billy Ray Vice is a final judgment.

Plaintiff has merely submitted a copy of the Bill of Indictment and a transcript of the jury conviction on April 13, 2007. Defendant herein

shows that the matter recently came for sentencing on August 6, 2007. [1] Pursuant to the Code of Criminal Procedure for the State of Louisiana, Billy Ray Vice may still exercise his right to request a reconsideration of a sentence under Article 88.1 and may further seek an appeal of the conviction pursuant to Article 914 of the Code of Criminal Procedure. Pursuant to these Code of Criminal Procedures Articles, Billy Ray Vice has thirty (30) days from the date of sentencing to file a Motion to Reconsider Sentence and further has the right to seek an appeal of the conviction thirty (30) days from the ruling on a Motion to Reconsider Sentence or if none is taken, then thirty (30) days from the date of sentencing. Further, the criminal defense attorney for Billy Ray Vice, Harold Thibodeaux, does intend to seek an appeal.[2] In summary, plaintiffs reliance on the principle of res judicata/collateral estoppel are without merit based on the fact that the jury's criminal conviction has not yet become a final judgment and is subject to appeal and therefore these doctrines are not applicable. Since plaintiff has submitted no other evidence in support of his Motion for Summary Judgment for a finding that Billy Ray Vice committed the acts necessary for determination of extortion, then plaintiffs Motion for Summary Judgment should be denied.

Even if the criminal conviction was final and not appealable (which it is not), offensive use of collateral estoppel is not appropriate in this case. Plaintiff uses res judicata and collateral estoppel

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[1] See certified copy of Minutes for Sentencing attached as Exhibit A.

[2] See Affidavit of Harold Thibodeaux attached as Exhibit B

interchangeably. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. *Parklane Hosiery Co., Inc., et al v. Shore*, 439 U.S. 322,99 S.Ct. 645. Offensive use of collateral estoppel occurs when plaintiff seeks to foreclose defendant from litigating an issue that the defendant previously litigated unsuccessfully in an action with another party. *Id* @ p. 649, 99 S.Ct. 649.

Plaintiff in this case suggests that the offensive use of collateral estoppel is automatic. It is anything but. In discussing the difficulties with using offensive collateral estoppel, the United States Supreme Court in *Parklane Hosiery v. Shore* concluded:

> ". . . the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial court's broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Parklane*, 99 S.Ct. 645 @ 651-652

Outside the criminal conviction, plaintiff has offered no evidence whatsoever that the alleged extortion letter was authorized, sent or in any way directed by Billy Ray Vice. Mr. Fox has no direct personal knowledge that Mr. Vice authorized the letter, printed it at the Police Department, or cause it to be mailed. Undersigned counsel for Mr. Vice had no participation whatsoever in the criminal proceeding. The elements of proof in a criminal case are different than those the plaintiff has the burden

of proving in the instant matter. Most importantly, Billy Ray Vice is actively appealing the criminal conviction and the possibility exists that it could be overturned.

II. Billy Ray Vice Was Not Acting "Under Color of Law"

Alternatively, in the even that the doctrine of res judicata and collateral estoppel applies (which is denied), defendant herein submits that the plaintiff has failed to show that Billy Ray Vice was acting under "Color of State Law" when he allegedly committed the act of extortion by sending an anonymous letter. The Motion for Summary Judgment filed by plaintiff is only seeking to find a judgment as a matter of law that Billy Ray Vice did commit the acts to be found guilty of extortion under LSA-R.S. 14:66 by preparing and sending the anonymous letter.[3] Plaintiff then seeks a judgment narrowly finding that the Town of Vinton is vicariously liable for the act of extortion by Billy Ray Vice. Plaintiff sets forth by Affidavit that On or about the month of January, 2005, I received the attached anonymous letter, which is a true and correct copy, in the United States Mail at my residence in Vinton, Louisiana, which is the same letter that was the subject of the above mentioned extortion file."[4] Defendant herein submits that by plaintiffs own admission, the letter was sent anonymously and therefore it is impossible for the

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[3] The anonymous letter was attached to plaintiffs Motion for Summary Judgment as Exhibit 1

[4] See Affidavit of Ricky Fox attached to plaintiffs Motion for Summary Judgment as Exhibit 4

plaintiff to take the position that Billy Ray Vice sent an anonymous letter under color of state law.

Section 1983 provides, in pertinent part, that "every one person who acting under color of any statute, ordinance, regulation, custom or usage, of any state...subjects or causes to be subjected any person...to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured..." 42 U.S.C.A. Section 1983. In short, Section 1983 provides a claim against anyone who "under color of state law deprives his or her constitutional rights. Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is close with the authority of state law, is action taken under color of state law. That is, a defendant acts under color of state law if he "misuses or abuses his official power" and if "there is a nexus between the victim, the improper conduct, and the defendant's performance of official duties." "If, however, a state officer pursues personal objectives without using or misusing the power granted by him by the state to achieve the personal aim, then he is not acting under color of state law." *Townsend vs. Moya*, 291 F. 3d 859 (5111 Cir. 2002), citing *United States vs. Causey*, 185 F. 3rd 407, 415 (5th Cir. 1999) and *Harris vs. Rhodes*, 94 F. 3rd 196, 197 (5th Cir. 1996).

In *Townsend vs. Maya*, supra, The Fifth Circuit Court of Appeal determined that the actions of the state prison guard were not under color of state law, but were purely personal in regard to the injury sustained by the prison imnate. The Court found that the stabbing ultimately occurred as a

matter of horseplay between the plaintiff and defendant.

In Wagoner vs. Dyson, 97-606 (La. App. 3rd Cir. 12/10/97); 704 So. 2d 346, the Third Circuit Court of Appeal for the State of Louisiana determined that the acts of sexual abuse by a sheriff deputy on a camping trip with children did not occur under color of state law. The Court noted that under Section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person who acted under a color of state law. Misuse of power, possessed by the virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law. The Court noted that "Acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of Officers who undertake to perform their official duties are included whether they hue to the line of their authority or overstep it." The evidence showed that the deputy was not going to perform any functions as a sheriff deputy at the campground and clearly the camping out and molestation were in the ambit of the deputy's personal pursuits, and his privilege of carrying a gun did not render his pursuits official business. *Wagoner vs. Dyson, supra*, pg. 348.

Plaintiff has failed to meet his burden of proving that Billy Ray Vice acted under a color of state law in regard to the alleged actions of extortion. Even if the Court did determine as a matter of res judicata that Billy Ray Vice was guilty

of extortion, the plaintiff has only submitted evidence that actually supports a finding that Billy Ray Vice was not acting under color of state law in regard to the act of extortion in mailing an anonymous letter to Ricky D. Fox at his private residence. Since the letter was anonymous, it is obvious that plaintiff cannot assert that Billy Ray Vice used his position as the chief of police to extort plaintiff. Further, plaintiff submits that the motivation for the extortion letter was to prevent plaintiff from running in the election for chief of police against Billy Ray Vice. The actions of being a candidate for the chief of police do not constitute an action under color of state law, but is merely a personal action by Billy Ray Vice to seek office. Plaintiff has provided absolutely no evidence in support that there is a nexus between the extortion of Ricky Fox and the performance of some official duty by Billy Ray Vice in his capacity as the Chief of Police. Plaintiffs affidavit testimony confirming that he received an anonymous letter only supports a finding that this was a pursuit of a personal objective without the use or misuse of the power granted as chief of police to achieve this personal aim.

In summary, even if the Court were to accept plaintiffs position that Billy Ray Vice performed the acts of extortion by sending an anonymous letter, the plaintiff has failed to prove that Billy Ray Vice was acting under color of state law since this action involved a personal pursuit as a candidate for office and did not involve a use or misuse of power granted to Billy Ray Vice as chief of police.

CONCLUSION

Billy Ray Vice extortion conviction in State Court is not a final judgment and does not act as res judicata or collaterally estop Mr. Vice from defending allegations of extortion in this case. Further, the plaintiff has failed to meet his burden of proving that Billy Ray Vice was acting under Color of State law when the alleged act of extortion was carried out. Accordingly, the Partial Motion For Summary Judgment filed by Ricky Fox should be denied at Mr. Fox's costs.

Respectfully submitted,

PLAUCHE, SMITH & NIESET
(A Professional Law Corporation)

By: _____

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Attorneys for defendant, Billy Ray Vice

MEMORANDUM BY TOWN OF VINTON IN OPPOSITION TO PARTIAL MOTION FOR SUMMARY JUDGMENT FILED BY RICKY D. FOX

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel, comes the defendant, TOWN OF VINTON, who submits the following Memorandum in Opposition to the Motion for Summary Judgment filed by plaintiff, Ricky D. Fox:

PROCEDURAL BACKGROUND

This is a civil rights action brought by plaintiff, Ricky D. Fox, pursuant to 42 U.S.C. 1983. Fox has set forth in his original complaint actions against the prior chief of police, Billy Ray Vice, and two police officers employed with the Town of Vinton, namely Arthur Phillips and Troy Cary, as well as an action against the Town of Vinton. Subsequently, plaintiff has voluntarily dismissed his action against defendant, Arthur Phillips. Plaintiff sets forth allegations in his complaint that Billy Ray Vice sent an anonymous letter to plaintiff extorting the plaintiff if he ran for the position of chief of police for the Town of Vinton. Further, the complaint alleges that Billy Ray Vice and the two officers conspired, directed and orchestrated a confrontation between the plaintiff and a private citizen at a high school basketball game whereby plaintiff was accused of making racial slurs. Plaintiff further alleges that an offense report was prepared at the direction of Billy Ray Vice regarding

the complaint of the private citizen at the high school basketball game.

Plaintiff specifically sets forth that the defendants, including the Town of Vinton, are liable under 42 U.S.C.A. Section 1983 which protects petitioner's rights, privileges and immunities as secured by the Constitution and laws. Plaintiff alleges that Billy Ray Vice, Arthur Ray Phillips and Troy Cary violated plaintiff's constitutional by the power conferred upon them at policemen of the Town of Vinton. Ultimately, plaintiff alleges that his rights, privileges and immunities afforded under the Constitution and laws were violated as follows:

A. The right to seek public office;

B. The right to be free from extortion;

C. The right to be protected by unlawful interference by police;

D. The right to be protected by malicious abuse of process;

E. The right to not be slandered/defamed;

F. The right to due process;

G. The right to not be subject to abuse of power;

H. Other violations to be proven at the trial of this matter.

In regard to the Town of Vinton, plaintiff alleges that the Town of Vinton is vicariously liable for the acts of its employees, Billy Ray Vice, Arthur Phillips and Troy Cary. Plaintiff seeks damages as well as attorney fees in regard to the Section 1983 claim.

Defendant shows that plaintiff has failed to set forth any allegations that the Town of Vinton maintained a policy or custom authorizing or encouraging its employees to violate the rights of plaintiff as alleged in the complaint.

FACTUAL BACKGROUND

In support of plaintiff's Motion for Summary Judgment, plaintiff has merely submitted as evidence the following:

A. Indictment against Billy Ray Vice for extortion, malfeasance in office and filing false public records;

B. Transcript evidencing that a jury did find Billy Ray Vice guilty of extortion on April 13, 2007;

C. A copy of the "extortion letter" and envelope;

D. An affidavit from Ricky D. Fox indicating that the attached anonymous letter was received by Ricky Fox at his residence by U.S. Mail.

Ultimately, plaintiff seeks to have the Court determine that as a matter of law the criminal jury

conviction of extortion should serve as res judicata in regard to the finding that Billy Ray Vice was guilty of the crime of extortion as set forth LSA-R.S. 14:66. Plaintiff then suggests that the Town of Vinton should be found vicariously liable for the acts of extortion under Section 1983 citing as authority a United States District Court case for the Northern District of New York as well as a case by the United States First Circuit Court of Appeal.

LAW AND ARGUMENT

I. Summary Judgment Standard

Under Fed.R.Civ.P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" if it may affect the outcome of the suit under governing law. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *Id.* The court must "review the facts drawing all references most favorable to the party opposing the motion." *Reid vs. State Farm Mutual Auto. Insurance Co.*, 874 F2d 577, 578 (5th Cir. 1986).

The moving party bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories,

admissions, and/or affidavits that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. vs. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L. Ed.2d 265 (1986); *Lawrence vs. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309 (5th Cir. 1999). The moving party need not produce evidence to negate the elements of the non-moving party's case. *Celotex corp.*, 477 U.S. at 325; *Lawrence*, 163 F.3d at 311.

Once the moving party carries its initial burden, the burden then falls upon the non-moving party to demonstrate the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. vs. Zenith Radio Corp.*, 475 U.S. 574, 584-88, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). The non-moving party "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace vs. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (citations omitted). This burden is not satisfied with some metaphysical doubt as to the material facts, or by a mere scintilla of evidence. *Little vs. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5td Cir. 1994) (citations omitted). In the absence of any proof, the court will not assume the non-moving party could or would prove the necessary facts. *Id.*

Pursuant to Local Rule 56.1, the moving party shall file a statement of material facts as to which it contends there is no genuine issue to be tried. Local Rule 56.2 requires that a party opposing the motion for summary judgment set forth a "short and concise statement of the material facts as to which there exists a genuine issue to be tried." All material facts

set forth in the statement required to be served by the moving party "will be deemed admitted, for purposes of the motion, unless controverted as required by this rule." Local Rule 56.2.

II. Criminal Jury Conviction As Res Judicata/Collateral Estoppel

Plaintiff sets forth that the United States Supreme Court has specifically held that a state court criminal conviction serves as res judicata and collateral estoppel so as to relieve the parties of the burden of establishing the same issues from the criminal conviction in a subsequent federal court civil proceeding. *Allen vs. McCurry*, 449 U.S. 90 (1980). This summation of the law by plaintiff fails to recognize that the doctrine of res judicata and collateral estoppel does not become imposed until their exists a final judgment. Thus, the mere finding by the jury of a verdict of guilty does not impose the principles of res judicata and collateral estoppel.

The cases cited in support of plaintiff's Motion for Summary Judgment distinctly speak of the doctrine of res judicata and collateral estoppel as being applicable to final judgments. Further, the United States Fifth Circuit Court of Appeal has specifically addressed this issue in *Brister vs. Parish of Jefferson, State of Louisiana*, 747 F. 2d 1019. The Fifth Circuit recognized that the state court judgment had been appealed to the Louisiana Appellate Courts at the time that the United States District Court granted a Summary Judgment basing its decision on res judicata principles. The Fifth Circuit vacated the United States District Court

judgment on the basis that "The state court judgment was not yet "final" for res judicata purposes." Thus, plaintiff must submit evidence showing that the criminal conviction for extortion against Billy Ray Vice is a final judgment.

Plaintiff has merely submitted a copy of the Bill of Indictment and a transcript of the jury conviction on April 13, 2007. Opponent herein, shows that the matter recently came for sentencing on August 6, 2007.[5] Pursuant to the Code of Criminal Procedure for the State of Louisiana, Billy Ray Vice may still exercise his right to request a reconsideration of a sentence under Article 881.1 and may further seek an appeal of the conviction pursuant to Article 914 of the Code of Criminal Procedure. Pursuant to these Code of Criminal Procedures Articles, Billy Ray Vice has thirty (30) days from the date of sentencing to file a Motion to Reconsider Sentence and further has the right to seek an appeal of the conviction thirty (30) days from the ruling on a Motion to Reconsider Sentence or if none is taken, then thirty (30) days from the date of sentencing. Further, opponent has learned that the criminal defense attorney for Billy Ray Vice, Harold Thibodeaux, does intend to seek an appeal.[6] In summary, plaintiff's reliance on a principle of res judicata/collateral estoppel are without merit based on the fact that the jury's criminal conviction has not yet become a final judgment and is subject to appeal and therefore these doctrines are not applicable. Since plaintiff has submitted no other evidence in

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[5] See attached certified copy of Minutes for Sentencing.

[6] See Attached Affidavit of Harold Thibodeaux

support of his Motion for Summary Judgment for a finding that Billy Ray Vice committed the acts necessary for determination of extortion, then plaintiff's Motion for Summary Judgment should be denied.

In the alternative that the Court should determine that the jury conviction would somehow be applied by the doctrines of res judicata and/or collateral estoppel, and without waiving said argument, defendant herein submits that the doctrine of res judicata does not apply. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit when involving the same parties or their privies based on the same cause of action. *Lawlor vs. National Screen Service Corporation,* 349 U.S. 322, 326; 75 S.Ct. 865, 867. The prior action involved the State of Louisiana against Billy Ray Vice only. The previous action by the State of Louisiana did not assert an action against Troy Cary, Arthur Phillips nor the Town of Vinton. Thus, the prior action did not include the same parties as the case herein.

Further, defendant submits that the doctrine of collateral estoppel does not apply per se in this instance on the basis that plaintiff is setting forth the "offensive use of collateral estoppel." Under the doctrine of collateral estoppel, the proceeding in the second action usually involves a different cause of action and a judgment in the prior suit precludes the re-litigation of issues actually litigated and necessary to the outcome of the first action. *Parklane Hosiery Co., Inc. vs. Shore,* 449 U.S. 322; 99 S. Ct. 645. The Supreme Court set forth that the

two types of collateral estoppel (defensive use of collateral estoppel and offensive use of collateral estoppel) should be treated differently. The defensive use of collateral estoppel occurs when a plaintiff was estopped from asserting a claim that the plaintiff had previously litigated and lost against another defendant. Offensive use of collateral estoppel involves a plaintiff seeking to estop a defendant from re-litigating the issues which the defendant previously litigated and lost against another plaintiff. In determining the differing characteristics of the two types of collateral estoppel, the Supreme Court determined that offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use of collateral estoppel does. Further, offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in an action. Further, offensive use of collateral estoppel may be unfair to that defendant whereby procedural opportunities may have been unavailable in the prior action. *Parklane Hosiery Co., Inc., supra,* pg. 329-330. Ultimately, the Supreme Court determined that the approach for dealing with the application of the doctrine of offensive collateral estoppel is not to preclude its use, but to grant the trial court broad discretion in determining when it should be applied. *Parklane Hosiery Co., Inc., supra,* pg. 331. Thus, the plaintiff must show that the use of collateral estoppel would not be unfair to the defendant, Billy Ray Vice. Defendant submits that plaintiff has failed to show that the offensive use of collateral estoppel would not be unfair to Billy Ray Vice and certainly has not

shown that it would not impose an unfair result upon defendant herein, the Town of Vinton.

III. Billy Ray Vice Was Not Acting "Under Color of Law"

In the alternative that the doctrine of res judicial and collateral estoppel should be applied, and without waiving said argument, defendant herein submits that the plaintiff has failed to show that Billy Ray Vice was acting under "Color of State Law" when he allegedly committed the act of extortion by sending an anonymous letter. The Motion for Summary Judgment filed by plaintiff is only seeking to find a partial judgment as a matter of law that Billy Ray Vice did commit the acts to be found guilty of extortion under LSA-R.S. 14:66 by preparing and sending the anonymous letter.[7] Plaintiff then seeks a judgment narrowly finding that the Town of Vinton is vicariously liable for the act of extortion by Billy Ray Vice. Plaintiff set forth by Affidavit that "In or about the month of January, 2005, I received the attached anonymous letter, which is a true and correct copy, in the United States Mail at my residence in Vinton, Louisiana, which is the same letter that was the subject of the above mentioned extortion file."[8] In response, defendant submits that by plaintiff's own admission the letter was sent anonymously and therefore it is impossible for the plaintiff to take the position that Billy Ray Vice sent an anonymous letter under color

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[7] The anonymous letter was attached to plaintiff's Motion for Summary Judgment as Exhibit 1

[8] See Affidavit of Ricky Fox attached to plaintiff's Motion for Summary Judgment as Exhibit 4

of state law. An "anonymous letter" is just that, a letter that is sent with no known author in a manner whereby the person sending the letter does not wish to be identified. The principle of "acting under color of law" is entirely based on the identity of the person and the use of that identify to deprive a person of constitutional rights. Thus, it is contradictory for the plaintiff to set forth a Section 1983 action for the actions of sending an anonymous letter.

Section 1983 provides, in pertinent part, that "everyone person who acting under color of any statute, ordinance, regulation, custom or usage, of any state...subjects for cases to be subjected any person...to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured..." 42 U.S.C.A. Section 1983. In short, Section 1983 provides a claim against anyone who "under color of" state law deprives his or her constitutional rights. Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is close with the authority of state law, is action taken under color of state law. That is, a defendant acts under color of state law if he "misuses or abuses his official power" and if "there is a nexus between the victim, the improper conduct, and the defendant's performance of official duties." "If, however, a state officer pursues personal objectives without using or misusing the power granted by him by the state to achieve the personal aim, then he is not acting under color of state law." *Townsend vs. Moya*, 291 F. 3d 859 (5th Cir. 2002), citing *United States vs. Causey*, 185 F. 3rd 407, 415 (5th Cir. 1999) and *Harris vs. Rhodes*, 94 F. 3rd 196, 197 (5th Cir. 1996). In

Townsend, supra, the Fifth Circuit Court of Appeal ultimately determined that the actions of the state prison guard were not under color of state law, but were purely personal in regard to the injury sustained by the prison inmate. The Court found that the stabbing ultimately occurred as a matter of horseplay between the plaintiff and defendant. *Townsend vs. Moya, supra.*

In *Wagoner vs. Dyson*, 97-606 (La. App. 3rd Cir. 12/10/97); 704 So. 2d 346, the Third Circuit Court of Appeal for the State of Louisiana determined that the acts of sexual abuse by a sheriff deputy on a camping trip with children did not occur under color of state law. The Court noted that under Section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person who acted under a color of state law. Misuse of power, possessed by the virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law. The Court noted that "Acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of Officers who undertake to perform their official duties are included whether they hue to the line of their authority or overstep it." The evidence showed that the deputy was not going to perform any functions as a sheriff deputy at the campground and clearly the camping out and molestation were in the ambit of the deputy's personal pursuits, and his privilege of carrying a gun did not render his pursuits official business. Ultimately, the Court determined that as a matter of

law there was no real nexus between the camping activity and Dyson's duties and obligations as a special deputy even though he was inspecting and checking on the campground as a duty as a deputy. *Wagoner vs. Dyson, supra*, pg. 348.

Plaintiff has failed to meet his burden of proving that Billy Ray Vice acted under a color of state law in regard to the alleged actions of extortion. In fact, the plaintiff is actually offering evidence that supports a finding that Billy Ray Vice was not acting under color of state law in regard to the act of extortion in mailing an anonymous letter to Ricky D. Fox at his private residence. Since the letter was anonymous, it is obviously clear that plaintiff cannot assert that Billy Ray Vice used his position as the chief of police to extort plaintiff. Further, plaintiff submits that the motivation for the extortion letter was to prevent plaintiff from running in the election for chief of police against Billy Ray Vice. The actions of being a candidate for the chief of police does not constitute an action under color of state law, but is merely a personal action by Billy Ray Vice to seek office. Plaintiff has provided absolutely no evidence in support that there is a nexus between the extortion of Ricky Fox and the performance of some official duty by Billy Ray Vice in regard to the mailing of the anonymous letter. Plaintiff's affidavit testimony confirming that it was an anonymous letter only supports a finding that this was a pursuit of a personal objective without the use or misuse of the power ganted as chief of police to achieve this personal aim.

In summary, even if the Court were to accept plaintiff's position that Billy Ray Vice performed the acts of extortion by sending an anonymous letter, the plaintiff has failed to prove that Billy Ray Vice was acting under color of state law since this action involved a personal pursuit as a candidate for office and did not involve a use or misuse of power granted to Billy Ray Vice as chief of police.

IV. Vicarious Liability of the Town of Vinton

Plaintiff has set forth in his Complaint as well as the Motion for Summary Judgment that the Town of Vinton is vicariously liable for the actions of Billy Ray Vice, Arthur Phillips and Troy Cary.

In response, defendant herein, asserts that liability cannot be premised upon the theory of respondent superior. *Monell vs. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). The U.S. Supreme Court in the case of *Monell*, ultimately determined that a municipality is considered a "person" under the Civil Rights Act of 1871; however, the United States Supreme Court refused to find that liability based on the doctrine of respondeat superior. The United States Supreme Court set forth the standard for imposing liability under Section 1983 against local governing bodies as follows:

> Local governing bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief, as here,

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 "person" by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. *Monell vs. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. C.t. 2018 (1978).

Thus, a plaintiff must show that the municipality caused the deprivation of the plaintiff's

constitutional rights as a result of an identifiable municipal policy, custom or direction. *Board of the County Commissioners of Bryan County, Oklahoma v. Jill Brown, 520 U.S. 397, 117S.Ct. 1382,* 137 *L.Ed.2d 626 (1997); Touchton v. Kroger Co.,* 512 So. 2d 520 (La. App. 3d Cir. 1987). In fact, *Monell* sets the threshold of proof at a high standard by stating that the policy must be the "moving force" behind the violation. Consequently, the unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur. Thus, isolated unconstitutional actions by municipal employees will almost never trigger liability. *Piotrowsky v. City of Houston,* 237 F3d 567 (5th Cir. 2001); see also, *Board of the County Commissioners of Bryan County, Oklahoma v. Jill Brown, supra.*

Plaintiff has only submitted evidence of a criminal jury conviction of the offense of extortion as well as provide a copy of the anonymous letter made the basis of the extortion letter. There is no additional evidence to show that the extortion was as a result of an identifiable municipal policy, custom or direction by the Town of Vinton. Proof of an isolated event can not serve to trigger liability on the Town of Vinton. To do so, would be applying a standard of vicarious liability, which is prohibited. In further response to plaintiff's allegations of liability on the part of defendant herein, the affidavit of Mayor Kenneth O. Stinson is submitted to confirm that as a prior alderman and current mayor for the Town of Vinton, there has never existed any policy or custom, either formally or informally, by the Town of Vinton to authorize or encourage its

employees to engage in such actions as alleged by the plaintiff in his Petition for Damages.[9] It is clear from the evidence before the Court, that plaintiff fails to provide any evidence to show that the Town of Vinton has established as a policy or custom, whether formally or informally, that its employees, including the chief of police, engage in such actions as alleged in plaintiff's Petition, including such actions as extortion.

In plaintiff's Motion for Partial Summary Judgment, he cites in support of his request for a finding of vicarious liability, two cases which are from other jurisdictions. Plaintiff cites the case of *Koziol vs. Hanna*, 107 F. Supp. 2d 170 (N.D. N.Y. 2000) in support of a finding of vicarious liability against the City of Utica, New York regarding a gag order. Please note that this case was decided in regard to 12(b)(6) motion. The 12(b)(6) should not be granted unless it appears beyond doubt that the plaintiff can prove any set of facts in support of his claim which would entitle him to relief. Further, the facts in the case are distinguishable as well. Plaintiff's complaint alleged liability on the part of the municipality on the basis of a gag order issued by the Mayor restraining the speech of all employees of the city. An allegation was set forth that this gag order not only applied to the plaintiff in this case but was applied to all employees within the city. Thus, the Court determined that the order was adopted and became an official policy of the city. Certainly, this case is very much distinguishable from the matter herein. First of all, this is a Motion for

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[9] See attached Affidavit of Kenneth O. Stinson as Exhibit C

Summary Judgment whereby the Court looks to the evidence submitted by the parties and does not take the allegations of the complaint as a given. Further, the "action" at issue in this case was a gag order issued by the mayor regarding all of its employees. The action involved in the matter herein involved the act of extortion by the chief of police as to one individual, Ricky Fox, for sending an anonymous letter encouraging Mr. Fox not to run in the election for chief of police. There is no evidence to show that there existed any policy being directed to all employees of the Town of Vinton to act in such a manner as extorting others nor is there a policy encouraging such action. This case has no application to the matter herein.

Plaintiff also cites the case of *Roma Construction Co. vs. Russo*, 96 F. 3d 566 (1st Cir. 1996). Again, this case was reviewing a matter decided on a 12(b)(6) motion. Thus, the Court looked to the pleadings which set forth that the plaintiffs alleged that the mayor, a town councilman and others operated a de facto government which controlled the town for more than a decade routinely engaging in bribery, extortion, corruption and other unlawful activities. Ultimately, the Court determined that the actions of the mayor himself might not give rise to municipal liability, but under the pleadings alleged by the plaintiff, a trier of fact could infer an unconstitutional policy or custom with respect to the town's government. Again, this case has no application to the matter herein. This matter is being decided on Motion for Summary Judgment regarding the evidence submitted by the parties and not merely on the allegations of the Complaint.

Further, the facts as alleged by plaintiff, if determined true, would show that the mayor, a councilperson and other persons within the town government engaged in bribery, extortion, corruption and other unlawful activities for over a decade. In the matter herein, we simply have the plaintiff relying on the criminal jury conviction of one act of extortion on the part of the chief of police against the plaintiff in order to discourage the plaintiff from running for chief of police. There is no evidence, nor any allegations, that the town officials and government itself engaged in such continued actions of extortion for any period of time, much less a decade. In short, this case has no application herein.

Plaintiff has failed to submit any evidence to show that the Town of Vinton adopted as a policy or custom, either formally or informally, that its town employees be authorized or encouraged to engage in such actions as extortion against individuals. To the contrary, the evidence shows that no such custom or policy exists. Thus, plaintiff's Motion for Partial Summary Judgment should be denied on these grounds.

V. State Law Claims Against the Town of Vinton

Plaintiff does not specifically set forth any state law claim in his Petition for Damages. In the event the Court should deem such a claim against the Town of Vinton, plaintiff has no claim as a matter of law against the Town of Vinton pursuant to respondeat superior. Plaintiff must prove that the Town of Vinton knew about the conduct, facilitated

the conduct, approved it or condoned it. *Sanders v. English*, 950 F.2d. 1152 (5th Cir. 1992). Further, the Town of Many is subject to immunity under LSA-R.S. 9:2798.1 regarding any action against a municipality based upon the exercise or performance or failure to exercise or perform policymaking or discretionary acts. As indicated above, there is no evidence to support a finding that any policy exists on the part of the Town of Vinton whereby the alleged acts of extortion were encouraged, authorized, or condoned. Therefore, the plaintiff has no action against the Town of Vinton under state law.

CONCLUSION

The Motion for Partial Summary Judgment filed by plaintiff, Ricky D. Fox, against the Town of Vinton should be denied.

Respectfully submitted,

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BY: s/ J. Mark Miller
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX

VS

BILLY RAY VICE, ET AL

DOCKET NO. 06-135

JUDGE MINALDI

MAGISTRATE JUDGE WILSON

PLAINTIFF'S REPLY MEMORANDUM TO OPPOSITION BY TOWN OF VINTON AND BILLY RAY VICE TO PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff, Ricky D. Fox, filed a motion for partial summary judgment with this court seeking a judgment as to liability against Billy Ray Vice (hereinafter sometimes referred to as "Vice") and the Town of Vinton (hereinafter sometimes referred to as "Vinton") based on the recent state court conviction of Vice for extortion. Both defendants referred to collectively at times as Defendants. Both Defendants have filed oppositions. Plaintiff responds as follows:

THE JUDGMENT OF CONVICTION IS NOT FINAL

Both Defendants argue convincingly that until Vice's appeal delays/rights have expired, his

conviction for extortion is not "final" such that it can be used as the basis to obtain a civil judgment against Vice. Plaintiff agrees and suggests that this Honorable Court hold the matter in abeyance until such time as Vice's extortion conviction does become final. Plaintiff will accept responsibility for furnishing the Court with documentation when the judgment does become final.

VICE WAS NOT ACTING "UNDER COLOR OF LAW"

Both Defendants complain that Plaintiff has not shown that Vice was acting under "color of state law" when he committed extortion.

In order for Plaintiff to obtain a judgment against Vice for extortion, it is not necessary to show that Vice was acting under "color of state law" when the extortion occurred. The simple act of extortion is sufficient. Plaintiff's petition filed herein alleges at paragraph 8:

> In or about the month of January, 2005, BILLY RAY VICE sent an anonymous letter to petitioner, RICKY D. FOX, threatening to take certain actions against FOX if FOX ran for the position of Chief of Police for THE TOWN OF VINTON; BILLY RAY VICE authored the letter, printed

> it at the Police Department
> and caused it to be mailed
> to petitioner.

The affidavit of Plaintiff, Ricky D. Fox, attached to Plaintiff's motion for summary judgment makes it clear that the extortion letter Fox received is the same letter that resulted in Vice's conviction for extortion. Contrary to Defendants' argument it is not necessary that Vice be shown to have been acting under "color of state law" to be convicted of extortion, nor is such necessary for a civil conviction resulting from extortion.

Extortion is not only a crime, but a civil wrong subject to tort liability and damages. Brauninger v. Ducote, 381 So.2d 1246 (La App. 4 Cir. 1979).

When Vice's criminal conviction for extortion becomes final, it will support a finding of civil liability for extortion based upon both *res judicata* and *collateral estoppel*. Allen v. McCurry, 449 U.S. 90 (1980).

LEGAL RESPONSIBILITY OF VINTON FOR VICE'S EXTORTION

Defendants argue that Plaintiff has presented insufficient evidence to hold Vinton liable under a **1983 civil rights** action or vicariously liable under state law. Plaintiff agrees. Accordingly, Plaintiff agrees to withdraw his motion for partial summary judgment only as to the Town of Vinton. Plaintiff hopes to re-urge the motion against the Town of

Vinton once additional discovery has been conducted.

CONCLUSION

Assuming that Vice's conviction for extortion becomes "final," then the doctrines of both *res judicata* and *collateral estoppel* are sufficient for imposing civil liability against Vice based upon Vice's conviction for extortion. Plaintiff respectfully requests this Honorable Court to hold in abeyance its ruling on Plaintiff's motion for partial summary judgment as to Vice until such time as Vice's extortion conviction becomes final. Plaintiff will accept responsibility for furnishing documentation to the Court at such time as the conviction may become final.

Plaintiff withdraws his motion for partial summary as to the Town of Vinton, but may ask the Court to reconsider the motion at such time as Plaintiff is able to develop evidence through discovery to support a finding of civil liability against the Town of Vinton.

Respectfully submitted:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX	:	**DOCKET NO. 06-135**
VERSUS	:	**JUDGE MINALDI**
BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY, AND THE TOWN OF VINTON	:	**MAGISTRATE JUDGE WILSON**

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes Defendant, BILLY RAY VICE, who hereby moves the Co-tart for summary judgment, pursuant to Louisiana Code of Civil Procedure Article 966, on the grounds that documentary evidence submitted herewith, along with applicable law, demonstrate there are no genuine issues of material fact and that BILLY RAY VICE is entitled to summary judgment dismissing all of Plaintiffs' claims against him with prejudice as a matter of law.

Plaintiff filed a Petition for Damages in the 14th Judicial District Court, Parish of Calcasieu, State of Louisiana, on December 20, 2005. The case was later removed to this Court. The Petition alleges that Vice and the other defendants conspired in various ways to prevent Plaintiff from being elected

the Chief of Police of the Vinton Police Department. The allegations are discussed in detail in Plaintiff's petition. All allegations made by Plaintiff as against Vice are for alleged actions that, if proven, occurred only when Vice was acting in his official capacity as the Chief of Police for the Town of Vinton. No allegations are made by Plaintiff against Vice individually.

WHEREFORE, premises considered, defendant, BILLY RAY VICE, prays that, after finding no genuine issue of material fact exists that Plaintiff has made allegations against him for actions that, if proven, occurred only in his official capacity as the Chief of Police of the Town of Vinton, defendant, BILLY RAY VICE, is entitled as a matter of law to summary judgment dismissing Plaintiffs claims against him with prejudice and at Plaintiffs cost.

Respectfully submitted,

PLAUCHE, SMITH & NIESET
(A Professional Law Corporation)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

* * *

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This memorandum is presented by defendant, BILLY RAY VICE, in support of his Motion for Summary Judgment.

BACKGROUND

Plaintiff filed a Petition for Damages in the 14th Judicial District Court, Parish of Calcasieu, State of Louisiana, on December 20, 2005. The case was later removed to this Court. The Petition alleges that Vice and the other defendants conspired in various ways to prevent Plaintiff from being elected the Chief of Police of the Vinton Police Department. The allegations are discussed in detail in Plaintiff's petition. All allegations made by Plaintiff as against Vice are for alleged actions that, if proven, occurred only when Vice was acting in his official capacity as the Chief of Police for the Town of Vinton. No allegations are made by Plaintiff against Vice individually.[10]

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[10] See Plaintiff's Petition for Damages which is on file with the Court and incorporated by reference herein for all purposes.

LAW AND ARGUMENT

Defendant, Billy Ray Vice, hereby adopts and incorporates by reference for all purposes the Motion for Summary Judgment and accompanying Memorandum in Support filed this 14th day of September, 2007, by defendant, The Town of Vinton. In further support of its Motion for Summary Judgment, defendant, Billy Ray Vice, offers the following.

Plaintiff has set forth in his Complaint that all defendants were acting in their capacity as law enforcement officers at all times. An official capacity suit is the equivalent of a suit against the entity of which the officer is an agent. *Kentucky vs. Graham*, 473 U.S. 159105 S.Ct. 3099 (1985); *Burge vs. St. Tammany Parish*, 187 F.3d 452, 466 (5th Cir. 1999). Thus, such a claim requires *Monell* proof of an official policy or custom as the cause of the constitutional deprivation. *Turner vs. Houma Municipal Fire and Police Civil Service Board*, 229 F. 3d 478, 483 (5th Cir. 2000) Courts have defined custom as a "persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Campbell vs. City of San Antonio*, 43 F. 3d 973, 977 (5th Cir. 1995)

As set forth above, plaintiff has failed to set forth a valid claim against the Town of Vinton pursuant to the *Monell* standard. Thus, any official capacity claims against defendant, Billy Ray Vice,

should be dismissed as well. It follows as well that, because Plaintiff has made no allegations against Billy Ray Vice outside of official capacity allegations, Plaintiff's claims against Billy Ray Vice should be dismissed entirely and with prejudice.

Respectfully submitted,

PLAUCHE, SMITH & NIESET
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Attorneys for defendant, Billy Ray Vice

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

* * *

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE TOWN OF VINTON

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel, comes the defendant, TOWN OF VINTON, who submits the following Memorandum in Support of its Motion for Judgment on the Pleadings and Motion for Summary Judgment.

VI. PLAINTIFF'S ALLEGATIONS and FACTUAL BACKGROUND

This is a civil rights action brought by plaintiff, Ricky D. Fox, pursuant to 42 U.S.C. 1983. Fox has set forth in his original complaint actions against the prior chief of police, Billy Ray Vice, and two police officers employed with the Town of Vinton, namely Arthur Phillips and Troy Cary, as well as an action against the Town of Vinton. Subsequently, plaintiff has voluntarily dismissed his action against defendant, Arthur Phillips.

Plaintiff sets forth allegations in his complaint that Billy Ray Vice sent an anonymous letter to

plaintiff extorting the plaintiff if he ran for the position of chief of police for the Town of Vinton. *(Complaint, Paragraph 8 - Doc. #1 of Rec.)* Further, the complaint alleges that Billy Ray Vice, Troy Cary and Arthur Phillips conspired, directed and orchestrated a confrontation between the plaintiff and a private citizen at a high school basketball game whereby plaintiff was accused of making racial slurs. Plaintiff further alleges that an offense report was prepared at the direction of Billy Ray Vice regarding the complaint of the private citizen at the high school basketball game and the offense report was shown to third persons *(Complaint, Paragraphs 9, 10, 11, 12 - Doc #1 of Rec.)*

Plaintiff specifically sets forth that the defendants, including the Town of Vinton, are liable under 42 U.S.C.A. Section 1983 which protects petitioner's rights, privileges and immunities as secured by the Constitution and laws. Plaintiff alleges that Billy Ray Vice, Arthur Ray Phillips and Troy Cary violated plaintiff's constitutional rights by the power conferred upon them as policemen of the Town of Vinton. Ultimately, plaintiff alleges that his rights, privileges and immunities afforded under the Constitution and laws were violated as follows:

A. The right to seek public office;

B. The right to be free from extortion;

C. The right to be protected by unlawful interference by police;

D. The right to be protected by malicious abuse of process;

E. The right to not be slandered/defamed;

F. The right to due process;

G. The right to not be subject to abuse of power;

H. Other violations to be proven at the trial of this matter.

(Complaint, Paragraphs 14, 15 and 16 - Doc #1 of Rec.)

In regard to the Town of Vinton, plaintiff alleges that the Town of Vinton is vicariously liable for the acts of its employees, Billy Ray Vice, Arthur Phillips and Troy Cary. Plaintiff seeks damages as well as attorney fees in regard to the Section 1983 claim.

Plaintiff's action revolves around the two events described in the Complaint. The first event involves the anonymous letter and plaintiff's allegations that it was authored and sent by Billy Ray vice. Ricky Fox confirmed that he received the anonymous letter in January, 2005 and he then turned the letter and envelope over to the FBI on the very next day. Mr. Fox confirmed that the copy of the letter which was presented to him at his deposition was indeed a copy of the anonymous letter that he had previously received in the mail. *(Deposition of Ricky Fox, pg. 24, line 25 through pg. 26, line 11 - Exhibit A and Deposition Exhibit 1 from Ricky Fox Deposition - attached as Exhibit B)* The additional

event described in the Complaint by plaintiff revolves around an incident report prepared by Sergeant Troy Cary in regard to the incident which occurred on February 7, 2005 at the Vinton High School basketball game. The incident report sets forth the initial information obtained by Sergeant Troy Cary from Joseph Budwine as well as a voluntary statement prepared by Joseph Budwine. The report also refers to the call by Ricky Fox on February 7, 2005 seeking to make a complaint against Joseph Budwine for making verbal threats at the Vinton High School. The report indicated that Mr. Fox did not want a report to be made. *(See Depos Exh 2 of Troy Cary-attached as Exhibit C)* Ultimately, plaintiff's actions against the defendants in this matter are centered on these two documents, i.e. the anonymous letter and the incident report.

VII. STANDARDS APPLICABLE TO MOTIONS FOR JUDGMENT ON THE PLEADINGS AND MOTIONS FOR SUMMARY JUDGMENT

A. Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(h)(2) provides that "after the close of the pleadings, the defense of failure to state a claim upon which relief can be granted, may, as has been done here, be raised in a Motion for Judgment on the Pleadings pursuant to Rule 12(c). When a Rule 12(c) motion raises a 12(b)(6) defense, the motion should normally be evaluated under the familiar standard applicable to a Rule 12(b)(6) motion to dismiss for failure to

state a claim upon which relief can be granted. *(See Wright & Miller, Fed. Practice & Procedure, Vol. 5A, § 1367, 1369 and cases cited therein)* The trial court may dismiss a complaint under Rule 12(b)(6) only if no relief can be granted based on any set of facts that could be proved consistent with plaintiffs' allegations. *(See Wright & Miller, supra)*

In reviewing a complaint on a motion for failure to state a claim for which relief can be granted under Fed.R.Civ.P. 12(b)(6), plaintiff's complaint is subject to dismissal if it appears plaintiff can prove no set of facts that would entitle him to relief. *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Rubenstein v. Collins*, 20 F.3d 160 (5th Cir. 1994). A motion to dismiss for failure to state a claim admits the facts alleged in the complaint, but challenges the plaintiff's right to relief based upon the facts alleged. *Crow v. Henry*, 43 F.3d 198 (5th Cir. 1995). However, in order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts and not mere conclusory allegations. *Kaiser Aluminum & Chemical Sales v. Avondale Shipyard*, 677 F.2d 1045 (5th Cir. 1982). The court is not required to accept legal conclusions, unsupported conclusions, unwarranted references, or sweeping legal conclusions cast in the form of factual allegations. *Causey v. Parish of Tangipahoa*, 167 F.Supp.2d 898 (E.D. La. 2001). Where the plaintiff has made claims under 42 U.S.C. §§ 1981, 1983, 1985, and 1988, he must plead specific facts, not mere conclusory allegations, in order to survive a motion to dismiss. *Streetman v. Jordan*, 918 F.2d 555 (5th Cir. 1990). In cases such as the present where complaints are lodged against public officials,

the Fifth Circuit has stated that "liberal notions of notice pleading must ultimately give way to immunity doctrines that protect us from having the work of our public officials chilled or disrupted by participation in the trial or the pretrial development of civil lawsuits." *Morrison v. City of Baton Rouge*, 761 F.2d 242 (5th Cir. 1985).

B. Motion for Summary Judgment

Under Fed.R.Civ.P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" if it may affect the outcome of the suit under governing law. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *Id.* The court must "review the facts drawing all references most favorable to the party opposing the motion." *Reid vs. State Farm Mutual Auto. Insurance Co.*, 874 F2d 577, 578 (5th Cir. 1986).

The moving party bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. vs. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L. Ed.2d 265 (1986);

Lawrence vs. Univ. of Tex. Med. Branch at Galveston, 163 F.3d 309 (5th Cir. 1999). The moving party need not produce evidence to negate the elements of the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325; *Lawrence*, 163 F.3d at 311.

Once the moving party carries its initial burden, the burden then falls upon the non-moving party to demonstrate the existence of a genuine issue of material fact. *Matsushita Elec. Indus, Co. vs. Zenith Radio Corp.*, 475 U.S. 574, 584-88, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). The non-moving party "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace vs. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (citations omitted). This burden is not satisfied with some metaphysical doubt as to the material facts, or by a mere scintilla of evidence. *Little vs. Liquid Air. Corp.*, 37 F.3d 1069, 1075 (5td Cir. 1994) (citations omitted). In the absence of any proof, the court will not assume the nonmoving party could or would prove the necessary facts. *Id.*

VIII. MOTION FOR JUDGMENT ON THE PLEADINGS

A. As a Matter of Law, Plaintiff's Action Against Billy Ray Vice for Allegedly Sending an Anonymous Letter to Plaintiff Fails to Meet the Requirement for "Color of Law"

Defendant herein submits that the plaintiff has failed to show that Billy Ray Vice was acting under Color of State Law when he allegedly

committed the act of extortion by sending the anonymous letter. Even accepting the allegations of plaintiff's Complaint setting forth that Billy Ray Vice authored the letter, printed it at the be acting under color of law pursuant to 42 U.S.C. Section 1983.

42 U.S.C. Section 1983 was enacted by Congress to make the 14th Amendment enforceable against state action. It states in part as follows:

> Every person who, **under color of** any statute, ordinance, regulation, custom or usage or any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges or immunities secured by the Constitution and laws**, shall be liable to the party injured in an action at law, suit in equity or other
> proper proceeding for redre ss... (emphasis added)

In short, Section 1983 provides a claim against anyone who "under color of" state law deprives his or

her constitutional rights. Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is close with the authority of state law, is action taken under color of state law. That is, a defendant acts under color of state law if he "misuses or abuses his official power" and if "there is a nexus between the victim, the improper conduct, in the defendant's performance of official duties." "If, however, a state officer pursues personal objectives without using or misusing the power granted by him by the state to achieve personal aim, then he is not acting under color of state law." *Townsend vs. Moya*, 291 F.3d 859 (5th Cir. 2002), citing *United States vs. Causey*, 185 F. 3d 407, 415 (5th Cir. 1999) and *Harris vs. Rhodes*, 94 F. 3d 196, 197 (5th Cir. 1996). In *Townsend, supra*, the 5th Circuit Court of Appeal ultimately determined that the actions of a state prison guard were not under color of state law, but were purely personal in regard to the injuries sustained by the prison inmate. The Court found that the stabbing ultimately occurred as a matter of horseplay between the plaintiff and the defendant.

In *Wagoner vs. Dyson*, 97-606 (La. App. 3rd Cir. 12/10/97); 704 So. 2d 346, the Third Circuit Court of Appeal for the State of Louisiana determined that the acts of sexual abuse by a sheriff deputy on a camping trip with children did not occur under color of state law. The Court noted that under Section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person who acted under a color of state law. Misuse of power,

possessed by the virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law. The Court noted that "Acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of Officers who undertake to perform their official duties are included whether they hue to the line of their authority or overstep it." The evidence showed that the deputy was not going to perform any functions as a sheriff deputy at the campground and clearly the camping out and molestation were in the ambit of the deputy's personal pursuits, and his privilege of carrying a gun did not render his pursuits official business. Ultimately, the Court determined that as a matter of law there was no real nexus between the camping activity and Dyson's duties and obligations as a special deputy even though he was inspecting and checking on the campground as a duty as a deputy. *Wagoner vs. Dyson, supra*, pg. 348.

Plaintiff fails to state a 1983 claim since the alleged actions of sending the anonymous letter to extort plaintiff does not come under color of state law. The fact that the letter was received by plaintiff with no indication of its author or who may have mailed the letter, evidences that the sender could not have been using his position of authority under color of law. Since the letter was anonymous, it is obviously clear that plaintiff cannot assert that Billy Ray Vice used his position as the chief of police to extort plaintiff. Further, plaintiff submits that the alleged motivation for the extortion letter was to prevent plaintiff from running in the election for chief of police against Billy Ray Vice. The actions of

being a candidate for the chief of police does not constitute an action under color of state law, but is merely a personal action by Billy Ray Vice to seek office. Plaintiff has provided absolutely no evidence in support that there is a nexus between the alleged extortion of Ricky Fox and the performance of some official duty by Billy Ray Vice in regard to the mailing of the anonymous letter.

In summary, even if the Court were to accept plaintiff's position that Billy Ray Vice performed the acts of extortion by sending an anonymous letter, the plaintiff has failed to prove that Billy Ray Vice was acting under color of state law since this action involved a personal pursuit as a candidate for office and did not involve a use or misuse of power granted to Billy Ray Vice as chief of police since the letter was anonymous.

B. As a Matter of Law, Plaintiff Has Failed to Show That He Was Denied a Federal Constitutional or Statutory Right

In general, the allegations asserted by plaintiff fail to establish any alleged acts on the part of the defendants to violate any clear and established constitutional rights of plaintiff. Plaintiff suggests that he has suffered violations of his federal rights from the receipt of the anonymous letter as well as the allegations that defendants orchestrated a confrontation between a private citizen, Joe Budwine, in order that plaintiff would be accused of making racial slurs. Plaintiff further alleges that an offense report was improperly prepared as a result of

the incident and the subsequent complaint by Joe Budwine.

As set forth above, Section 1983 requires not only a finding that the defendant acted under color of state law but also requires the identification of the constitutional right that has allegedly been violated.

1. Plaintiff Has No Standing To Bring a 1983 Action

The Courts have previously set forth that there is no federally protected right to win an election to public office. *Flinn vs. Gordon*, 775 F.2d 1551 (11 Cir. 1985) In this instance, plaintiff has asserted violation of his right to seek public office; however, plaintiff did win the election and is the current chief of police. In this instance, plaintiff lacks standing to set forth a violation of a right to seek public office. A party invoking federal jurisdiction must meet a three-prong test for standing. First, plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual as opposed to hypothetical. Second, there must be a causal connection between the injury and the conduct complained of; that is, the injury has to be "fairly traceable" to the challenged action of the defendant and not the result of the independent action of some third party not before the Court." Third, it must be "likely" as opposed to merely speculative that the injury will be redressed by a favorable decision. *Lujan vs. Defenders of Wildlife*, 504 U.S.555, 560-561; 112 S. Ct. 2130 (1992) Plaintiff has failed to set forth any injury in regard

to the alleged acts to deprive him of his right to seek public office. Plaintiff pursued the election and won the position of chief of police and continues to maintain that position. Plaintiff has failed to set forth an "injury in fact." Further, plaintiff fails to show a "fairly traceable" connection to the challenged action of depriving his right to public office and the resulting injury versus the independent actions of third parties. Examples of such third parties are the effects of independent persons campaigning as well as the acts of citizens own motivations in regard to the results of an election. Bottom line, plaintiff fails to show an injury and any traceable connection to the challenged action of depriving his rights.

2. Preparation of a False Offense Report Does Not Constitute Violation of Federal Right

Plaintiff alleges that the confrontation with Joe Budwine at the Vinton High School basketball game was orchestrated by defendants. Further, plaintiff alleges that defendants prepared a false Offense Report regarding the Joe Budwine incident. Defendant submits that said allegations do not meet the requirement of a violation of federal right as required by Section 1983.

The Courts have concluded that the filing of a false police report does not constitute a violation of federal right. In *White vs. Tamlyn*, 961 F. Supp. 1047 (E.D.Mich. 1997), the plaintiff filed a Section 1983 action against the Michigan State Police alleging that they filed a false police report against her as

well as provided false testimony at the trial. The Court determined that the "filing of such reports alone does not itself deprive a person of a constitutional right under the 14th Amendment." Such action only constitutes a Due Process violation when the falsified report leads to an unconstitutional deprivation of life, liberty or property. *Landrigan vs. City of Warwick*, 628 F.2d 736, 745 (1st Cir. 1980). Thus, the existence of an alleged "falsified" police report does not in and of itself violate any constitutional right and any Section 1983 claim premised upon such an allegation is unavailing. In *Nowell vs. Acadian Ambulance Service*, 147 F. Supp. 2d 495 (W.D. La. 2001), the Western District has confirmed and followed the holding that the mere existence of a falsified police report does not in and of itself violate any federal rights. To the contrary, falsified police reports are only actionable under Section 1983 if those reports result in the deprivation of life, liberty or property.

In summary, plaintiff's allegations that a false offense report was prepared does not constitute a violation of his rights pursuant to Section 1983. Plaintiff must show that the falsified report led to unconstitutional deprivation of life, liberty or property. Plaintiff has failed to set forth any such violation. Plaintiff was never arrested or charged with any violations regarding the offense report and complaint by Joe Budwine. In fact, Billy Ray Vice and Troy Cary determined that any investigation and subsequent action regarding the complaint should be forwarded to the District Attorney office since the complaint involved a candidate for the chief of police. They did not want the appearance of a bias

investigation by their own police department, so it was forwarded out of their hands.[11] Plaintiff has set forth an action that he was defamed or slandered as a result of the false offense report as well as the extortion letter, but as set forth hereafter, said actions do not constitute a violation of rights under Section 1983.

3. Plaintiff's Allegations of Damage to Reputation and Defamation Do Not Constitute a Violation of Plaintiff's Rights Under Section 1983

Plaintiff has described both the incident involving the anonymous letter as well as the incident with Joe Budwine at the Vinton High School basketball game as the operative facts of his Complaint. Plaintiff alleges that the offense report was allegedly shown to third persons and asserts a claim that his rights were violated for damage to reputation and defamation.

Defendant submits that plaintiff does not have a federal right in regard to reputation or defamation. Actions for injury caused by the possible harm of the plaintiff's reputation is not actionable under Section 1983. Such a defamation, without some resultant denial of a constitutional right, is not actionable under Section 1983. *Paul vs. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976) In *Kaylor vs. Fields*, 661 F. 2d 1177 (8 Cir. 1981), the plaintiffs were former elected officials who brought suit against a

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[11] *See Incident Report – Exhibit C, Deposition of Billy Ray Vice, p. 88, line 24 – p. 89, line 7 – Exhibit D, Deposition of Troy Cory, p. 75, line 20 – p. 76, line 7 – Exhibit E.*

state attorney after losing their bids for re-election. The plaintiff claimed that the state attorney had made continual, baseless accusations of criminal activity without filing any charges and had made derogatory statements to the news media. Citing *Paul vs. Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976), the Circuit Court upheld the dismissal of the claim on the grounds that damage to one's reputation, without some resultant denial of a constitutional right, is not actionable under Section 1983.

In *Lahaza vs. Azeff*, 790 F. Supp. 88 (E.D. Pa. 1992), the plaintiffs alleged that there existed a conspiracy to initiate a criminal investigation which caused plaintiff to be deprived of an opportunity to win the primary election for the board of supervisors. The allegations indicated that the plaintiff was not prevented from running in the election, but alleged that the unfavorable publicity generated by the defendant was a contributing factor in his defeat. In response, the Court determined that there is no federally protected right to win election to public office, citing *Flinn vs. Gordon*, 775 F.2d 1551 (11 Cir. 1985). Further, the plaintiffs alleged a violation of a liberty interest in their reputations. In response, the Court cited *Paul vs. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976), which held that a person's interest and reputation alone is not a "liberty" guaranteed against state deprivation without due process of law. The Court explained that the plaintiff in the *Paul* case had been arrested on a shoplifting charge. The police chief had circulated a flier in the area containing the photos and names of area shoplifters, and the plaintiff's name was on the photo. After the flier was circulated, all shoplifting charges against

the plaintiff were dropped. Plaintiff filed a complaint under 42 U.S.C. 1983 against the chief of police alleging defamation. The Supreme Court declared the following:

> Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the 14th Amendment. That being the case, petitioner's defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of an "liberty" or "property" interest protected by the Due Process Clause. *Paul*, *supra* at 1166.

The Court in *Lahaza* summed up their holding by finding that at best, "plaintiff had alleged a claim that public knowledge of a criminal investigation caused injury to his reputation, which knowledge may have resulted in the loss of an election. This theory would effectively render virtually every criminal investigation actionable, under Section 1983, if the public somehow became aware of it.

This is clearly not what was intended by Congress in the drafting of 42 U.S.C. Section 1983. Accordingly, there is no valid procedural or substantive due process claim for the alleged

violation of plaintiff's interest in his reputation." Ultimately, the Court determined that plaintiff failed to state a claim upon which relief could be granted and the claims were dismissed.

In *Franklin vs. City of Kansas City*, 959 F. Supp. 1380 (Kan. 1997), the plaintiff alleged defamatory conduct against the defendants representing false statements and documents to the Court and grand jury which corrupted the mind of the grand jury. Ultimately, the Court determined that the defendant's alleged showing of false statements and documents could not be found to be a violation of a federally protected right. Thus, because Section 1983 is only a mechanism under which an individual may seek redress for violations of federally protected rights and because the plaintiff has failed to demonstrate that his defamatory/perjury claim involves a violation of any of his federally protected rights, the Court concluded that summary judgment was appropriate.

The 5th Circuit Court of Appeal has previously set forth that damage to one's reputation alone, apart from some more tangible interest such as employment, does not implicate any property or liberty interest sufficient to invoke the due process clause. *Thomas vs. Kippermann*, 846 F. 2d 1009 (5th Cir. 1988)

As set forth above, plaintiff has no claim under Section 1983 for violation of his rights in regard to any defamation claim or claim for damage of reputation. Thus, plaintiff's actions pursuant to

Section 1983 for defamation or damage to reputation should be dismissed.

4. Vicarious Liability of the Town of Vinton

Plaintiff's complaint is based on two alleged events. The first incident involves plaintiff receiving an anonymous letter, which plaintiff alleges was authored and sent by Billy Ray Vice. The second incident involves the alleged orchestration of a confrontation between plaintiff and Joe Budwine at the Vinton High School basketball game. A complaint was made by Joe Budwine and an offense report was ultimately prepared by Officer Troy Cary. Thus, plaintiff alleges vicarious liability on the part of the Town of Vinton based on these alleged actions of Billy Ray Vice, Troy Cary and Arthur Phillips.

In response, defendant herein, asserts that liability cannot be premised upon the theory of respondeat superior. *Monell vs. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). In the case *of Monell*, the U.S. Supreme Court, ultimately determined that a municipality is considered a "person" under the Civil Rights Act of 1871; however, the United States Supreme Court refused to find that liability based on the doctrine of respondeat superior. The United States Supreme Court set forth the standard for imposing liability under Section 1983 against local governing bodies as follows:

> Local governing bodies, therefore, can be sued directly under

> Section 1983 for monetary, declaratory, or injunctive relief, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 "person" by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. *Monell vs. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. C.t. 2018 (1978).

Thus, a plaintiff must show that the municipality caused the deprivation of the plaintiff's constitutional rights as a result of an identifiable municipal policy, custom or direction. *Board of the County Commissioners of Bryan County, Oklahoma v. Jill Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L.Ed.2d 626 (1997); Touchton v. Kroger Co.*, 512 So.

2d 520 (La. App. 3d Cir. 1987). In fact, *Monell* sets the threshold of proof at a high standard by stating that the policy must be the "moving force" behind the violation. Consequently, the unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur. Thus, isolated unconstitutional actions by municipal employees will almost never trigger liability. *Piotrowslzy v. City of Houston*, 237 F.3d 567 (5th Cir. 2001); see also, *Board of the County Commissioners of Bryan County, Oklahoma v. Jill Brown, supra.*

The law requires that the custom or policy must be made by the official policy maker for the municipality who has the final policy making authority. In regard to an official policy maker, the official employee must have *final* policy making authority. *Pembaur vs. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986) In determining who the "final policy maker" is in regard to official policy within a municipality, the 5th Circuit has determined in *Worsham vs. City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989) that one must look to the local state law regarding who within the municipality has "final policy making authority." Ultimately, the Court determined that since the city council had the ultimate authority regarding the policies which would exist as to its employees through its final making authority to terminate an employee, then it was the final policy making authority.

Defendant submits that the alleged event regarding the anonymous letter can not even be considered against the Town of Vinton, since it

occurred anonymously and thus was not performed under color of law. Therefore, that leaves the remaining incident regarding the orchestration of a confrontation between plaintiff and Joe Budwine at that Vinton High School basketball game and the resulting offense report. Plaintiff has not set forth any allegations that a policy or custom existed within the Town of Vinton to authorize or encourage such acts as orchestrating an event between private citizens which would result in an offense report being prepared. The allegation of this one act does not equate to prove that the Town of Vinton was a moving force behind a policy for police to orchestrate an event which would be the subject of an Incident Report. Further, this one act involves actions alleged by plaintiff to be motivated by the Chief of Police to win an election, which is a personal endeavor by the Chief. Certainly, this one alleged act regarding a personal mission of Mr. Vice at election time, can not be found to support a finding that the Town of Vinton maintained a custom or policy to deprive rights of citizens in such a manner. Since the Board of Alderman of the Town of Vinton is the final decision maker in regard to the hiring, firing, demotions, discipline and promotions of police officers and other employees, plaintiff must allege acts by the Board of Alderman which would equate to a policy or custom to violate plaintiff's federal rights. *Worsham vs. City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989); *Grant vs. Grace*, 870 So. 2d 1011 (La. 2004); *LSA-R.S. 33:423* The claims of plaintiff against the Town of Vinton should be dismissed for failure to state a valid based claim against the municipality pursuant to *Monell*.

5. No Basis for an Official Capacity Claim

Plaintiff has set forth in his Complaint that all defendants were acting in their capacity as law enforcement officers at all times. An official capacity suit is the equivalent of a suit against the entity of which the officer is an agent. *Kentucky vs. Graham*, 473 U.S. 159105 S.Ct. 3099 (1985); *Burge vs. St. Tammany Parish*, 187 F.3d 452, 466 (5th Cir. 1999). Thus, such a claim requires *Monell* proof of an official policy or custom as the cause of the constitutional deprivation. *Turner vs. Houma Municipal Fire and Police Civil Service Board*, 229 F. 3d 478, 483 (5th Cir. 2000) Courts have defined custom as a "persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Campbell vs. City of San Antonio*, 43 F. 3d 973, 977 (5th Cir. 1995)

As set forth above, plaintiff has failed to set forth a valid claim against the Town of Vinton pursuant to the *Monell* standard. Thus, any official capacity claims against the defendants should be dismissed as well.

6. Summary of Claims Which Should Be Dismissed Under Motion for Judgment on Pleadings

In summary, defendant submits that, as a matter of law, plaintiff's Section 1983 actions based on the operative facts of the anonymous letter should be dismissed for failure to meet the requirement of "color of law." Further, plaintiff's Section 1983 actions based on the alleged false offense report should also be dismissed since plaintiff has failed to show a violation of a federal right pursuant to Section 1983. Additionally, plaintiff's Section 1983 actions for defamation and damage to reputation should be dismissed as well for failure to show a violation of a federal right pursuant to Section 1983. Finally, plaintiff's action against the Town of Vinton as well as any official capacity claims against the defendants should be dismissed for failure to meet the *Monell* standard of showing a policy or custom of violation of federal rights by the municipality.

IX. MOTION FOR SUMMARY JUDGMENT

A. Lack of Violation of Federal Rights

Defendant herein submits that in the alternative that the Court has not dismissed all actions in regard to the Motion for Judgment on the Pleadings, defendant submits that no genuine issue as to any material fact exists and that defendant is entitled to judgment as a matter of law dismissing the claims set forth above in its Motion for Judgment on the pleadings pursuant to Rule 56 of the Federal Rules of Civil Procedure. In regard to any proof of actual injury and traceability to a violation, plaintiff Ricky Fox actually beat Billy Ray Vice in the election and is the current Chief of Police. *(Deposition of Ricky Fox, p. 197, lines 10 -16 - Exhibit A)* Defendant

submits that plaintiff fails to provide any evidence in support of the claims and thus the claims for violation of right to seek public office, as well as those claims for violations of defamation and preparing a false offense report should be dismissed.

B. Plaintiff Fails to Prove Vice Authored or Sent the Anonymous Letter

The testimony taken in this matter is filled with much speculation and opinions about "who sent the anonymous letter" but the testimony has failed to prove by a preponderance of the evidence any particular person as being the author or sender. The evidence does not support a finding that Billy Ray Vice authored or sent the letter. Mr. Vice actually learned of the information about Ricky Fox from Mr. Delcombre. Mr. Delcombre had worked as a state police trooper and had indicated to Billy Vice that he had information about Ricky Fox. *(Deposition of Billy Ray Vice, pg. 47, line 10 through pg. 48, line 21 - Exhibit D)*

Ultimately, Mr. Vice indicated he did not author or send the letter. He had an idea of three or four people who may have sent the letter. He indicated those persons as being Arthur Phillips, Chad Porterfield, Mr. Delcombre and Ricky Fox himself. However, Mr. Vice admitted he did not have any actual knowledge of who sent the letter. *(Deposition of Billy Ray Vice, pg. 96, line 90 through pg. 103, line 15 - Exhibit D)* Even plaintiff admits that he does not have any definitive evidence that Mr. Vice authored or sent the letter. Ricky Fox admitted in deposition testimony that he did not

have any direct information that Billy Ray Vice was the person that sent the anonymous letter. Ricky Fox also confirmed that he had no information to show that the letter was printed at the police department. *(Deposition of Ricky Fox, pg. 30, line 1 through pg. 32, line 11 - Exhibit A)* Ricky Fox also admitted that neither the anonymous letter nor the complaint arising from the Joe Budwine were ever printed in the paper. *(Deposition of Ricky Fox, pg. 102, lines 15-25 - Exhibit A)* In summary, plaintiff fails to meet his burden of proving that Billy Vice authored or sent this letter and any claims associated with the anonymous letter should be dismissed.

C. Plaintiff fails to prove Vice, Cary and Phillips orchestrated the Joe Budwine Incident

Plaintiff also fails to bear the burden of proving that Vice, Cary and Phillips conspired to set up the Joe Budwine incident. Joseph Budwine was deposed and at all times stated that the information he provided to the Vinton Police Department was true and more importantly stated that he provided the information to the police without any alleged help or orchestration by Vice, Cary or Phillips to make this altercation occur. *(See Deposition of Joseph Budwine)* Billy Ray Vice denied any involvement in the Joe Budwine incident or putting Joe Budwine up to making allegations against Mr. Fox. Mr. Vice also denied having any involvement regarding what Mr. Budwine set forth in his statement. *(Deposition of Billy Ray Vice, pg. 123, lines 10-19 - Exhibit D)* Ricky Fox actually made

statements in his deposition that Mr. Budwine was incapacitated by alcohol. Mr. Fox stated that during the incident at the basketball game he determined that Joe Budwine was extremely "high." Mr. Fox believed he was high on a particular drink. Mr. Fox wasn't sure if Joe Budwine would even remember what he said at the basketball game. *(Deposition of Ricky Fox, pg. 49, lines 7-10 - Exhibit A)* Mr. Fox also confirmed that he had no direct information that the offense report was prepared by Troy Cary under the direction of Billy Ray Vice. Ricky Fox only indicated that the offense must have been prepared under the direction of Billy Ray Vice since he was chief of police. *(Deposition of Ricky Fox, pg. 66, line 5 pg. 67, line 3 - Exhibit A)* In summary, the testimony has only provided speculation that Vice, Cary and Phillips orchestrated the Joe Budwine incident. Plaintiff's own admission that Mr. Budwine was high would explain why Mr. Budwine's memory of the events differed from that of plaintiff. Plaintiff simply fails to prove this allegation and all actions based on the Joseph Budwine incident and subsequent incident report should be dismissed.

D. Plaintiff's 1983 Actions Based on the Anonymous Letter Should be Dismissed Entirely

As set forth in defendant's motion for judgment on the pleadings, defendant submits that plaintiff's Section 1983 claim should be dismissed since plaintiff can not prove that any of the named defendants were acting under color of law with regard to the anonymous letter. Defendant reiterates for purposes of its motion for summary judgment

herein, that the very fact that the letter was sent anonymously to plaintiff is direct evidence that it can not be shown the letter was authored or sent under color of law. Plaintiff acknowledged that he received the letter anonymously through the mail with no indicator regarding the sender. *(Deposition of Ricky Fox, pg. 24, line 25 through pg. 26, line 11 - Exhibit A and Deposition Exhibit 1 from Ricky Fox Deposition - attached as Exhibit B)* It goes without saying that no one's official position was being asserted in regard to that anonymous letter. It would not even matter if plaintiff could prove the identify of the person who sent the letter for purposes of the 1983 action, because that person specifically chose not to identify himself or herself and did not use his or her official position in regard to this letter. Thus, plaintiff's claims based on the anonymous letter should be dismissed as to all defendants on this argument alone.

E. Vicarious Liability of the Town of Vinton

Plaintiff's complaint is based on two alleged events as set forth above. Defendant has previously set forth the applicable law and argument in regard to the *Monell* requirement in its Motion for Judgment on the Pleadings. Defendant reiterates the *Monell* defense in regard to its Motion for Summary Judgment as well.

Defendant submits that the evidence clearly shows that plaintiff fails to meet the requirements of *Monell*. As set forth above, plaintiff has no actions arising from the anonymous letter for failure to meet

the requirement of "color of law." Thus, this leaves the Joe Budwine incident and subsequent incident report as the operative event to attempt to impose liability against the Town of Vinton. In response, defendant submits that the Town of Vinton, through the final decision making authority, the Board of Aldermen, never sought to formally or informally impose any policy or custom of its employees, including police officers, to engage in any activities that could be deemed to violate federal rights in such a manner as orchestrating a false confrontation between citizens and preparing false offense reports. Defendant maintains that these incidents of an alleged false offense report does not equate to a violation of a federal right; however, for sake of argument, defendant submits that even if a violation of right was determined, the Town of Vinton has not imposed any policy or custom to engage in such violation.

The Town of Vinton is subject to the Lawrason Act.[12] (LSA-R.S. 33:321, et seq) Pursuant to LSA-R.S. 33:381, the officers of every municipality shall be a mayor, aldermen, a chief of police, a tax collector and a clerk. In accordance with the Lawrason Act, the municipal powers are directed by the Board of Alderman. In regard to law enforcement personnel for a municipality with an elected position of chief of police, the Board of Alderman has the ultimate authority to hire, fire, demote, discipline and promote.[13] The Chief of Police merely has authority to make recommendations. *Grant vs.*

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[12] See Affidavit of Kenneth O. Stinson – Exhibit F

[13] See Affidavit of Kenneth O. Stinson – Exhibit F

Grace, 870 So. 2d 1011 (La. 2004); *LSA-R.S. 33:423* In regard to the vacancy of a municipal officer, that position is filled for the term by the aldermen at any regular or special meeting. LSA-R.S. 33:383(C)

Billy Ray Vice was acting as an appointed Chief of Police to fill the vacancy of the prior elected Chief of Police, Betty Dupree. Billy Ray Vice had run in the prior election with Ms. Dupree and others and Mr. Vice had the next highest percentage of votes behind Ms. Dupree. The official act appointing Billy Ray Vice as the acting chief of police was by a vote of the Board of Aldermen. The Board of Aldermen continued to maintain its authority by virtue of the Lawrason Act to hire, fire, demote, discipline and promote police officers.[14]

In this instance, plaintiff has alleged actions by not only the police officers of the Town of Vinton, but the appointed Chief of Police, Billy Ray Vice. At no time during the time that Billy Ray was acting as chief of police nor subsequent thereto, did the Board of Aldermen seek to impose any policy or custom on the part of any employees including law enforcement officers, to violate the federal rights of citizens and more specifically, the Board of Aldermen certainly did not impose any policy or custom to law enforcement officers to orchestrate events which would result in a criminal complaint nor to file false offense reports nor extort its citizens.[15]

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[14] See Affidavit of Kenneth O. Stinson - Exhibit F

[15] See Affidavit of Kenneth O. Stinson - Exhibit F

Defendant submits that the alleged event regarding the anonymous letter can not even be considered against the Town of Vinton, since it occurred anonymously and thus was not performed under color of law. Therefore, that leaves the remaining incident regarding the orchestration of a confrontation between plaintiff and Joe Budwine at that Vinton High School basketball game and the resulting offense report. Defendant submits that plaintiff has failed to produce any evidence that Vice, Cary or Phillips orchestrated the Joe Budwine confrontation, but has only provided speculation.[16] Further, defendants have certainly failed to identify any policy or custom on the part of the Town of Vinton to deprive citizens of their rights in such a fashion as described in the Budwine incident. As set forth above, the Board of Aldermen constitutes the final decision maker regarding the hiring, firing, promotion, demotion, and discipline of employees including police personnel. At no time has the Board of Aldermen suggested any policy or custom of such deprivation of rights by the police.[17]

Defendant shows that there has been no evidence obtained through deposition or otherwise to show a custom or policy of the Town of Vinton as required by *Monell*.

Arthur Phillips confirmed that he was not aware of the Vinton Police Department being involved in any other investigations which involved an election. Mr. Phillips also confirmed that he was

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[16] See Deposition of Joseph Budwine - Exhibit G

17 See Affidavit of Kenneth O. Stinson - Exhibit F

not aware of any other incidents where the police department was accused of conspiring, directing, orchestrating a person to fake a confrontation. Further, Mr. Phillips confirmed that he was not aware during the time of Chief Vice of any other allegations against the police department of bribing or influencing private citizens. *(Deposition of Arthur Phillips, pg. 137, line 20 through pg. 138, line 15 (Exhibit H)* Mr. Phillips confirmed that there existed no policy or custom from the Town of Vinton to violate constitutional rights of citizens to be slandered or defamed, impede their ability to seek public office, to extort, to violate due process, abuse the power of the office nor any other constitutional violation. Arthur Phillips confirmed that the mayor nor the Town Council ever suggested such a policy or custom to violate a person's rights. *(Deposition of Arthur Phillips, pg. 141, line 8 through pg. 143, line 6 - Exhibit H)* Arthur Phillips confirmed again that there was no policy or custom for the Town of Vinton whereby officers were encouraged to fake a confrontation to discredit someone, send an anonymous letter to a candidate not to run for office, preparing a false incident report or showing a false incident report to third persons. *(Deposition of Arthur Phillips, pg. 158, line 1 through pg. 160, line 15 - Exhibit H)*

Troy Cary denied being involved in any conspiracy regarding the incident with Joe Budwine at the Vinton High School basketball game. Further, he denied that Billy Ray Vice or Arthur Phillips were in any way involved. Troy Cary confirmed that he had never been accused of orchestrating some type of event by any other person while he was an officer

with the Vinton Police Department. *(Deposition of "Troy Cary, pg. 107, line 19 through pg. 109, line 6 - Exhibit E)* Troy Cary confirmed that the police department nor the Town of Vinton ever set forth as a policy to engage in such activities as described in the Complaint filed by Ricky Fox. Troy Cary also confirmed that the council, mayor nor chief of police ever set forth any policy of intimidating witnesses or manipulating statements. *(Deposition of Troy Cary, pg. 108, line 25 through pg. 116, line 22 - Exhibit E)*

Mr. Vice reviewed the Complaint filed by plaintiff and denied the allegations of Paragraph 8 regarding the anonymous letter and Paragraph 9 regarding the Joe Budwine incident. Mr. Vice confirmed that he never set forth a policy or sent the message that it was the proper practice to set up citizens to be falsely accused. Mr. Vice also confirmed that he did not set forth any policy to obtain false statements from witnesses or to prepare false offense reports. Mr. Vice also confirmed that he never submitted as policy to the officers to violate any rights as enumerated in Paragraph 16 of the Complaint. Mr. Vice also confirmed that there has never been any policy or custom sent down from the mayor of the Town of Vinton to engage in such activities that have been alleged in plaintiff's Complaint nor engage in violations of constitutional rights as set forth in Paragraphs 16 of plaintiff's Complaint. *(Deposition of Billy Ray Vice, pg. 125, line 8 through pg. 131, line 16 - Exhibit D)*

Finally, plaintiff even confirmed that he was not aware of any information to show such a custom or policy on the part of the Town of Vinton. Mr. Fox

admitted that he did not suspect anyone else with the Town of Vinton other than Vice and Phillips were involved with the letter. Further, Mr. Fox confirmed that he was not aware of any information that the Town of Vinton encouraged the Budwine incident or the anonymous letter. Mr. Fox also confirmed that he was not aware of any information of the council members or mayor putting out information against other persons who may have run for office. Mr. Fox confirmed that he was not aware that the mayor or council had ever encouraged employees to make defamatory or false statements about persons in the community.*(Deposition of Ricky Fox, pg. 108, line 2 through pg. 111, line 13 - Exhibit A)* Mr. Fox confirmed that he was not aware of any custom or policy by the mayor or council to infringe on constitutional rights as set forth in Paragraph 16 of the Complaint. *(Deposition of Ricky Fox, pg. 188, line 4 through pg. 190, line 22 - Exhibit A)*

In summary, the testimony set forth above clearly shows an absence of any policy or custom by the Town of Vinton which was a moving force in regard to any alleged violations asserted by plaintiff. Plaintiff's claims against the Town of Vinton should be dismissed with prejudice.

F. No Basis for an Official Capacity Claim

Defendant resubmits its position that there exists no basis of an official capacity claim against any of the defendants. Defendant set forth this position above in regard to the Motion for Judgment on the Pleadings and resubmits it herein. An official

capacity suit is the equivalent of a suit against the entity of which the officer is an agent. *Kentucky vs. Graham*, 473 U.S. 159105 S.Ct. 3099 (1985); *Burge vs. St. Tammany Parish*, 187 F.3d 452, 466 (5th Cir. 1999). Thus, such a claim requires *Monell* proof of an official policy or custom as the cause of the constitutional deprivation. *Turner vs. Houma Municipal Fire and Police Civil Service Board*, 229 F. 3d 478, 483 (5th Cir. 2000) Plaintiff has failed to set forth a valid claim against the Town of Vinton pursuant to the *Monell* standard. Thus, any official capacity claims against the defendants should be dismissed as well.[18] Since no individual claims have been asserted, all claims against all defendants should be dismissed.

X. CONCLUSION

Defendant submits that its Motion for Judgment on the Pleadings and Motion for Summary Judgment should be granted dismissing all claims of plaintiff against the Town of Vinton.

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[18] Co-defendant, Troy Cary, joins in this Motion in regard to a failure to prove an official capacity claim against him and seeks dismissal of all claims by plaintiff.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX

VS.

BILLY RAY VICE, ET AL

DOCKET NO. 06-135

JUDGE MINALDI

MAGISTRATE JUDGE WILSON

PLAINTIFF RICKY FOX'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' TOWN OF VINTON'S AND TROY CARY'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT VICE'S MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

Please accept this as Plaintiff Ricky D. Fox's (hereinafter "Fox") Memorandum in Opposition to Defendants' Town of Vinton's and Troy Cary's Motion for Judgment on the Pleadings and Motion for Summary Judgment, and Defendant Vice's Motion for Summary Judgment.

This matter is fixed to be heard without argument on October 9, 2007. For the following reasons, defendants' motions seeking dismissal of Fox's civil rights claims predicated on 42 U.S.C. § 1983 should be granted. However, Fox's remaining

claims, based upon state tort law, should be maintained as to these defendants. As to Fox's state tort claims, defendants' motions should be denied.

STATEMENT OF THE CASE

Vice gathered defamatory allegations about Fox, then wrote the extortion letter.

Defendants, Billy Ray Vice (hereinafter "Vice") and Troy Cary (hereinafter "Cary") both came to the Vinton Police Department in November, 2004. Vice came to the Vinton Police

* * *

Budwine told Fox the only reason Budwine had done it was because Vice had told Budwine that if Budwine got into trouble, Vice would take care of it. Fox Deposition, P. 42, L. 1.

For the reasons given below, Fox's state tort claims against defendants Town of Vinton, Vice, and Cary should be maintained, and any motion seeking dismissal of the state tort claims should be denied.

LAW AND ARGUMENT

Defendants correctly argue that Fox presents no valid claim pursuant to 42 U.S.C. § 1983. As to the extortion letter, it was sent anonymously. Vice did not act under "color of law" concerning the extortion letter.

As to the fabricated basketball game incident, Fox cannot show a deprivation of a right, privilege or

immunity secured by the United States Constitution and laws. Although Vice and Cary acted under "color of law" whenever they conspired to fabricate the basketball game incident and file a false police report, Fox was not prevented from running for election. Nor is the defamation Fox suffered as a result of this fabrication deprivation of a property right.

However, in order for Fox to prevail on his state law tort claims, it is not necessary to show that any defendant acted under "color of law." Nor is it necessary Fox show he was denied a federal constitutional or statutory right. Defendants' motions to dismiss Fox's state tort claims should be denied.

Genuine issues of material fact exist on all essential elements of Fox's state tort claims.

In considering a summary judgment motion, a court must draw all reasonable inferences in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). A court must resolve any doubts against the moving party. Id. For summary judgment purposes, a judge does not weigh conflicting evidence with respect to a disputed material fact. Anderson, 106 S.Ct. at 2513.

Evidence may be direct or circumstantial. Direct evidence requires no inferences, whereas circumstantial evidence does require drawing inferences. Sylvester v. SOS Children's Villages Illinois, Inc., 453 F.3d 900, 903 (7th Cir. 2006). Direct

evidence of any particular fact is not necessary if competent circumstantial evidence exists from which the necessary inferences can be reasonably drawn. While circumstantial evidence may require a longer chain of inferences, if each link is solid, the evidence may be compelling. Id.

Fox's Petition for Damages sets forth factual allegations which describe extortion and the tort of defamation. Direct evidence of defendant Vice's responsibility for the extortion letter is outlined in Fox's rendition of the facts, above. Circumstantial evidence of the conspiracy between Vice, Cary, and Budwine to fabricate the basketball game incident is overwhelming. At a minimum, the circumstantial evidence of the conspiracy creates genuine issues of material fact. Defendants' motion to dismiss these claims should be denied.

Under Louisiana state law, extortion is a crime. LSA-R.S. 14:66. Not only is extortion a crime, but it is a civil wrong subject to tort liability and damages. Brauninger v. Ducote, 381 So.2d 1246 (La. App. 4 Cir. 1979). Alternatively, sending an extortion letter is an act which would support the tort of intentional infliction of emotional distress. To recover for intentional infliction of emotional distress, a plaintiff must establish that the defendant's conduct was extreme and outrageous, the emotional distress was severe, and that the defendant either desired to inflict severe emotional distress or knew that severe emotional distress would be substantially certain to result from his conduct. White v. Monsanto Co., 585 So.2d 1205, 1209 (La. 1991). Certainly, sending the extortion

letter was extreme and outrageous conduct — so extreme, it is punishable as a felony. Defendants' motions to dismiss the state tort claims should be denied.

To establish a claim for defamation, a plaintiff must show a false and defamatory statement, an unprivileged publication to a third party, fault on the part of the publisher, and damages. Kennedy v. Sheriff of East Baton Rouge, 2005-1418 (La. 7/10/06), 935 So.2d 669, 674. By definition, a statement is defamatory if it tends to harm the plaintiff's reputation, deter others from associating or dealing with the plaintiff, or otherwise expose the plaintiff to contempt or ridicule. Id. Certainly, an allegation of racist behavior such as in the case at bar is defamatory, especially in the context of an election run. As to an unprivileged publication, a tort-feasor is never "privileged" to publish a defamatory lie he himself has created. When a tortfeasor concocts a defamatory lie and publishes it, actual malice is proven. In the case at bar, questions of material fact exist on all of the essential elements for defamation. Defendants' motions as to Fox's state tort claims should be denied.

Neither Vice nor Cary enjoy qualified immunity.

Qualified immunity insulates a government official performing discretionary functions from liability so long as his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct.

2727, 73 L. Ed. 2d 396 (1982). But if the law is clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Id at 818-19. In the case at bar, neither defendant Vice nor Cary enjoy qualified immunity.

As to the extortion letter, defendant Vice was not acting in his capacity as Chief of Police. No argument for qualified immunity can be heard.

As to the conspiracy between, Vice, Cary and Budwine to create a racial incident with Fox, neither Vice nor Cary were engaging in a discretionary function. The law provides public officials no discretion in this matter — they are not to engage in criminal conduct. Budwine's complaint and the subsequent incident report charging Fox with disturbing the peace by racial slur is against the law. LSA-R.S. 14:59 makes it a crime to give "any false report or complaint to a sheriff, or his deputies, or to any officer of the law relative to the commission of or an attempt to commit, a crime."

Any defense of qualified immunity for defendants Vice and Cary must fail if Fox proves the facts alleged. Defendants' motions to dismiss Fox's state law tort claims should be denied.

Defendant the Town of Vinton may be vicariously liable for the acts of its employees according to state tort law.

Defendant the Town of Vinton is mistakenly fixated on what must be proven in order to

successfully bring a civil rights claim under 42 U.S.C. 1983. Under state tort law, it is not necessary to show an "identifiable municipal policy, custom or direction" in order to prove liability on the part of the Town of Vinton.

In the case sub judice, defendant the Town of Vinton employed both defendant Vice and defendant Cary. Under state law, an employer can be held vicariously liable for the torts of its employees. LSA-C.C. Art. 2320. An employer's liability can extend to intentional torts committed by its employees which are within the course and scope of employment. Latullas v. State, 94-2049 (La. App. 1 Cir. 6/23/95), 658 So.2d 800, 803-04. Assisting a complainant in filing a complaint and making an incident report on that complaint are certainly within the course and scope of employment. Defendant the Town of Vinton's motion to dismiss Fox's state tort claim should be denied.

The Louisiana Supreme Court set forth four factors to consider in determining whether an employer should be held liable for the tortious acts of its employees: (1) whether the tortious act was primarily employment-rooted; (2) whether the act was reasonably incidental to the performance of the employees' duties; (3) whether the act occurred on the employer's premises; and (4) whether the act occurred during the hours of employment. LeBrane v. Lewis, 292 So.2d 216 (La. 1974). In the case at bar, defendants Vice and Cary's' actions in the basketball game incident were primarily employment-rooted. Vice and Cary used their positions with the Vinton Police Department to

orchestrate an incident intended to further their careers with the Police Department. Their acts were reasonably incidental to the performance of their policing duties when they took Budwine's complaint and filed an incident report. All of this took place on the Town of Vinton's premises and occurred during Vice's and Cary's hours of employment. At a minimum, there exists a question of fact as to whether the Town of Vinton is liable for Fox's damages arising from the basketball game incident. Defendant Town of Vinton's motion to dismiss Fox's state tort claim should be denied.

CONCLUSION

For the reasons given above, defendants' motion to dismiss Fox's civil rights claims pursuant to 42 U.S.C. § 1983 should be granted. As to Fox's state law tort claims, all defendants' motions should be denied.

Respectfully submitted:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX

VS.

BILLY RAY VICE, ET AL

DOCKET NO. 06-135

JUDGE MINALDI

MAGISTRATE JUDGE WILSON

AFFIDAVIT OF CHAD PORTERFIELD

STATE OF LOUISIANA

PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, duly commissioned and qualified within and for the State and Parish aforesaid, personally came and appeared:

CHAD PORTERFIELD,

A person known to me, who, after being by me first duly sworn, deposed and state that:

1. My name is Chad Porterfield.
2. I work as a detective for the Vinton Police Department.
3. I have personal knowledge of the facts contained in this Affidavit, and all of the statements made in this Affidavit are true.

4. In December, 2004, I was a detective with the Vinton Police Department.

5. On December 10, 2004, I was riding in a Christmas parade with acting Chief of Police Billy Ray Vice.

6. We saw Ricky Fox standing on a corner as we rode in the parade.

7. Upon seeing Ricky Fox, Billy Ray Vice said that he, Vice, could have Ricky Fox crucified with one telephone call.

8. On February 14, 2005, I was summoned by Billy Ray Vice into his office.

9. Troy Cary was present.

10. In this meeting, Billy Ray Vice informed me that I was being demoted from detective, and Troy Cary was taking over my duties.

11. I questioned Chief Vice about the reason for the demotion.

12. After some questioning, Chief Vice finally admitted that I was being demoted because of my association with Ricky Fox, who was running as Chief Vice's opponent in the upcoming election for Chief of Police.

CHAD PORTERFIELD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

RICKY D. FOX	:	CIVIL ACTION NO. CV06-0135
VERSUS	:	JUDGE MINALDI
BILLY RAY VICE, ET AL	:	MAGISTRATE JUDGE WILSON

FILED: _____ _____
DEPUTY CLERK
OF COURT

MEMORANDUM OF PLAINTIFF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY SHELTER MUTUAL INSURANCE COMPANY AND STATEMENT OF CONTESTED FACTS

MAY IT PLEASE THE COURT:

Defendant, Shelter Mutual Insurance Company ("Shelter") has filed a Motion for Summary Judgment alleging its insurance policy does not provide coverage to its insured, Billy Vice.

* * *

LAW AND ARGUMENT

* * *

In its Memorandum of Support of Motion for Summary Judgment, Shelter states: "If Mr. Vice's assertions are true, there can be no liability with regard to his insurer, Shelter, thus entitling Shelter to summary judgment." *(Memorandum at p. 1)* In making this statement, Shelter simply ignores its obligation to continue to provide its insured with a defense, even if the allegations of the Petition are ultimately proven unfounded. As the court states: "Although the allegations of the Petition may ultimately turn out to be incorrect or are untrue, the insurer is still obligated to provide a defense." *Dugas Pest Control v. Mutual Fire, Marine and Inland Ins. Co.*, 504 So.2d 1051, 1054 (La. App. 1 Cir. 1997).

A comparison of the Petition to the Shelter policy reveals that Shelter has a duty to defend Vice. Plaintiff, Ricky Fox, asserts that Vice committed numerous tortious acts, including malicious abuse of process, slander/defamation and abusive power. As a result, he suffered emotional distress, humiliation and damage to reputation. Under the plain language of the Shelter policy, the cause of action asserted by Fox would be covered under both "bodily injury" and "personal injury."

In *Nelson v. Want Ads of Shreveport, Inc.*, 31-168 (La. App. 2 Cir. 10/30/98), 720 So.2d 1280, the

court considered whether an insurance policy provided coverage for claims of misrepresentation, infliction of emotional distress, misappropriation or conversation, injury to reputation and unfair trade practices, with additional claims of tortious interference with a contract, assault and battery. In finding coverage, the court stated that the policy definition of "bodily injury" allows for the possibility of purely emotional harm, without any physical trauma.

The policy definition of bodily injury found in *Nelson* is substantially similar to the definition of "bodily injury" found in the Shelter insurance policy. In his petition, Fox asserts a claim for purely emotional harm resulting from numerous alleged tortious of Vice. As explained in *Nelson*, the Shelter policy of insurance provides insurance coverage for the claims of Fox under both the "bodily injury" and the "personal injury" insuring clauses of the insurance policy.

* * *

The petition alleges that Vice committed numerous tortious acts against Fox and that the acts caused Fox emotional distress. Nowhere does the petition allege that Vice's actions were intentional, that Vice's actions were arising out of a business pursuit or that he was acting as the police chief when he committed the alleged actions. A plain reading of these allegations reveals that Shelter must defend Vice. "An insurer's duty to defend arises whenever the pleadings against the insured

disclose even a possibility of liability under the policy." *Vaughn*, 785 So. 2d 84. Therefore, strictly construing the exclusionary provisions, and resolving any ambiguity or doubt as to the meaning of the provisions in favor of its insured, the duty to defend remains. Vice respectfully urges this Court to deny the Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX — CIVIL ACTION NO.: 2:06-CV-135

VERSUS

BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY AND THE TOWN OF VINTON — JUDGE MINALDI

MAGISTRATE JUDGE WILSON

REPLY MEMORANDUM BY THE TOWN OF VINTON

I. PLAINTIFF'S COMPLAINT FAILS TO ASSERT STATE LAW CLAIMS

Rule 8 of the Federal Rules of Civil Procedure requires that plaintiff assert a statement regarding his claim showing entitlement to relief as well as a demand for the relief sought. In this instance, plaintiff set forth only specific relief under 42 U.S.C. Section 1983 for violation of the petitioner's rights, privileges and immunities as secured by the Constitution and laws. *(See Complaint, Doc. 1 of Record)* In response to the Motion for Judgment on the Pleadings and Motion for Summary Judgment filed by defendant herein, plaintiff submitted a response as admitting that petitioner has no action pursuant to 42 U.S.C. Section 1983 against the defendants. However, petitioner then sets forth that he has a claim under state tort law for extortion,

intentional infliction of emotional distress and defamation. Defendant submits that petitioner has failed to set forth notice through the complaint of any state tort claim for extortion, intentional infliction of emotional distress and defamation.

II. CLAIMS REGARDING ANONYMOUS LETTER

A. Anonymous Letter Does Not Qualify as an Act of Extortion

Plaintiff submitted in his response to the dispositive motions filed by defendants that although plaintiff does not have a 42 U.S.C. 1983 action against defendants, he is entitled to relief for a state law claim of extortion. Plaintiff asserts that the anonymous letter rises to the level of being extortion under LSA-R.S. 14:66. Specifically, LSA-R.S. 14:66 sets forth that Extortion is the communication of threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description. Thus, to prove the elements of extortion, it must be proved that a communication of a threat to another occurred with a specific intent to obtain anything of value or any acquittance, advantage, or immunity of any description. In reviewing the anonymous letter, the language of the anonymous letter does not equate to meet the requirement of a communication of a threat to another with the specific intent to obtain an advantage. The anonymous letter opens up by stating that "Each week we're going to put an ad in the Vinton newspaper" and sets forth what information would be provided to the newspaper on a

weekly basis. The letter then sets forth information regarding Ricky Fox and the week that the information would be placed in an ad in the Vinton newspaper. In closing, the letter states that "We will probably send a copy of this to everyone that supports you" and further states "We don't think it will do any good to send this letter out until after you start running. I know all the local churches and women's group and other politicians such as the chief, mayor and aldermen would like a copy."

Defendant herein submits that a careful review of the anonymous letter reveals that it does not rise to the level of being considered a threat with specific intent to obtain anything of value or an advantage. The introductory paragraph simply states that the information in the letter would be submitted as an ad in the Vinton newspaper with no conditional language that Ricky Fox act or not act in a certain way to keep if from going into the newspaper. Thus, this language does not set forth the threat of putting the ad in the newspaper with a specific intent to obtain anything from Ricky Fox. In the latter portion of the letter, the author simply states that they would probably send a copy of the letter itself to supporters and further concludes that it would not do any good to send a copy of the letter out until after Ricky Fox started running. A careful review of this letter reveals that the latter statements in the letter reflect the act of sending a **copy of the letter to supporters**. The initial language in the letter states that the information would be placed in an **ad in the newspaper**. At the most, the letter simply states that sending a copy of the letter to supporters would not do any good to

reveal the information against Ricky Fox until he started running. There is no conditional threat that Fox should not run for office. Further, there is no specific intent to keep Ricky Fox from running for this position since the letter indicates the information would be advertised in the Vinton newspaper regardless of whether he ran for the position of chief of police. Further, plaintiff's petition specifically sets forth that at all times regarding the receipt of the anonymous letter and the orchestration of the Joe Budwine incident, Ricky Fox was an announced candidate for the position of chief of police for the Town of Vinton *(Paragraph 6 of Complaint, Doc. 1 of Record)*, so there could be no threat that he should not run for office since he was already a candidate.

In *State vs. Sharlhorne*, 544 So. 2d 1317 (La. App. 1st 1989), the Court reversed a trial court's finding of extortion based on the fact that the communication was determined not to meet the high standard of a showing of a specific intent to communicate a threat. In that instance, the defendant entered a store and advised that he had recently been released from prison and then requested money from the alleged victim. After the alleged victim stated that she had no money, the defendant stated "I don't forget those who help me." The court determined that although the alleged victim testified that she was in fear and felt that she was threatened, the communication did not rise to the level of showing that the defendant specifically intended to communicate a threat to obtain something of value. In this instance, the anonymous letter simply sets forth the statement that the

information would be placed in an ad in the newspaper. There is no communication that Ricky Fox was to act in any certain way to keep the information from being placed as an ad in the newspaper. Further, the statement that it probably wouldn't do any good to send out a copy of the letter to supporters, does not rise to a showing of specific intent to communicate a threat. Further, if the advantage was to keep Fox from running for office, that advantage is impossible to gain since Ricky Fox had already announced his candidacy at that time. Thus, the anonymous letter does not rise to the level of a finding of extortion and any claim by plaintiff under state tort law should be dismissed.

B. Plaintiff Fails to Prove a Claim for Intentional Infliction of Emotional Distress

In plaintiff's Response, he sets forth an alternative theory that the act of sending an extortion letter is an act which would support the tort of intentional infliction of emotional distress. Defendant submits that plaintiff has failed to prove the stringent requirements for the tort of intentional infliction of emotional distress. The Louisiana Supreme Court has set forth in *White vs. Monsanto*, 585 So. 2d 1285 (La. 1991) that a plaintiff seeking to recover for intentional infliction of emotional distress must establish: (1) That the conduct of the defendant was extreme and outrageous; (2) That the emotional distress suffered by the plaintiff was severe; and (3) That the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. The conduct must be so

outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indecencies, threats, annoyances, petty oppressions, or other trivialities. *King vs. Phelps Dunbar, L.L.P.*, 98-1805 (La. 6/4/99); 743 So. 2d 181, 185. Conduct which is merely tortuous or illegal does not rise to the level of being outrageous or extreme.

In this instance, the information received by Ricky Fox in the anonymous letter does not rise to the level required to prove intentional infliction of emotional distress. Further, plaintiff has provided no evidence to prove that he suffered emotional distress that was severe. Ricky Fox did not have to undergo any counseling or treatment for alleged mental distress. *(Dep. of Ricky Fox, pg. 116, lines 21-24)* Thus, plaintiff's claims for intentional infliction of emotional distress should be dismissed.

C. Plaintiff Fails to Prove Vice Authored or Sent the Anonymous Letter

Defendant states there is absolutely no direct evidence to find that Billy Ray Vice authored or mailed the anonymous letter received by Ricky Fox on January 18, 2005. Plaintiff attempts to hang his hat on the testimony of Joe Duenas and Kent Peveto in regard to a "confession" by Billy Ray Vice. An overall review of the testimony by Joe Duenas and Kent Peveto quickly brings to light that the statements by Billy Ray Vice were certainly not a confession. In fact, the testimony only provides that this was a voluntary interview whereby Agent

Duenas did not record any of the conversation. Agent Duenas merely prepared notes regarding the interview. Even Trooper Kent Peveto stated that he could not testify as to the organization of the notes by Agent Duenas and what he deemed important or not to write down in his notes. *(Testimony of Kent Peveto, pg. 50, line 18 – 23)* Further, the testimony of Agent Duenas and Kent Peveto confirmed the manner of the statements by Billy Ray Vice regarding his statement that he wrote the letter. Mr. Vice explained that he stated that he did not write the letter, but the officers kept stating that he did write the letter and they knew he wrote the letter and Mr. Vice merely responded in a sarcastic manner that "If you knew I wrote the letter, I guess I wrote the letter." Ultimately, Mr. Vice made it clear that he did not write the letter or send the letter. *(Dep. of Billy Ray Vice, pg. 64 - pg. 66)* Thus, plaintiff cannot rely on the statements as being some form of a voluntary confession. Both Agent Duenas and Trooper Peveto testified that fingerprint analysis was performed and was inconclusive. Further, Trooper Peveto confirmed that he did not perform any analysis regarding the typewritten print nor any other attempt to test the letter or envelope to find direct proof relating Mr. Vice to the letter. Thus, plaintiff's claims against defendants based on the anonymous letter being sent by Billy Ray Vice are without merit and should be dismissed.

D. No Vicarious Liability for Anonymous Letter

In the alternative that this Court should find that Billy Ray Vice committed an intentional tort of

extortion or intentional infliction of emotional distress in regard to the anonymous letter, defendant herein submits that it is not vicariously liable for the acts of Billy Ray Vice. The Louisiana Supreme Court has set forth in *Baumeister vs. Plunkett*, 95-2270 (La. 5/21/96) that vicarious liability will attach only if the employee is acting within the ambit of his assigned duties and also in furtherance of his employer's objective. The court set forth the following factors: (1) Whether the tortuous act was primarily employment rooted; (2) Whether the violence was reasonably incidental to the performance of the employee's duties; (3) Whether the act on the employer's premises; and (4) Whether it occurred during the hours of employment. Further, conduct motivated by purely personal considerations entirely extraneous to the employer's interest does not find vicarious liability. In order for employer to be vicariously liable, the employee's tortuous conduct must be so closely connected in time, place and causation to his employment duties as to be regarded a risk of harm fairly attributable to the employer's business as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interest. *Torrence vs. Lewis*, 05-72 (La. App. 5th Cir. 5/31/05); 905 So.2d 1104.

Plaintiff has failed to prove and meet any of the factors to find vicarious liability on the part of the Town of Vinton in regard to the anonymous letter. The anonymous letter does not have any specific ties to Vice's employment he obtained by appointment as chief of police by the Board of Aldermen for the Town of Vinton. The alleged acts against Billy Ray Vice are in regard to the election

for the elected position of chief of police. Thus, this event was not employment rooted to Vice's current employment position. Further, there are no facts to show the anonymous letter was prepared in regard to some performance of the employee's duties nor are there any facts to show that the anonymous letter was prepared and mailed on the employer's premises or during hours of employment. By the very nature of the letter being anonymous, there is an absence of any proof that the act or preparing this letter and mailing this letter can in any way be proved to have been acted out during the course and scope of employment. Finally, the anonymous letter on its face shows a mere personal pursuit and can not be found to be in furtherance of the Town of Vinton's objective.

III. STATE TORT LAW CLAIMS REGARDING JOE BUDWINE INCIDENT

A. Plaintiff Fails to Prove Joe Budwine Incident Was Conspired by Defendants

Defendant herein previously set forth that plaintiff failed to prove that Vice, Cary and Phillips orchestrated the incident involving Joe Budwine and Ricky Fox. Plaintiff has only responded with speculative opinion testimony of Arthur Phillips which is not admissible. Joe Budwine at all times stated that the information he provided to the Vinton Police Department was true and that there was no involvement by Vice, Cary or Phillips in regard to the incident that occurred at the basketball game. Further, Joe Budwine stated that he gave his

statement to the Vinton Police Department voluntarily. Joseph Budwine set forth that the written statement was prepared by him. *(See Deposition of Joe Budwine)* There is no evidence to show that the statement was not the handwriting of Joseph Budwine. Further, there is no evidence to refute Joseph Budwine's testimony that he voluntarily wrote the statement describing his version of the incident. Thus, there is no direct evidence to prove that Vice, Cary or Phillips orchestrated and conspired to make Joseph Budwine enter into an altercation with Ricky Fox. Plaintiff has merely provided conjecture and speculation. Thus, any claim based on the orchestration of the Joseph Budwine incident should be dismissed.

B. Plaintiff Fails to Prove Defamation

Defamation is a tort which involves the invasion of a person's reputation or good name. Four elements are necessary to establish a defamation cause of action: (1) A false and defamatory statement concerning another; (2) An unprivileged publication to a third party; (3) Fault on the part of the publisher; and (4) A resulting injury. *Fitzgerald vs. Tucker*, 98-2313 (La. 6/29/99); 737 So.2d 706

If a plaintiff is a public official, then the plaintiff cannot recover for a defamatory statement relating to his or her official conduct, even if false, unless the public official proves actual malice by clear and convincing evidence. The statement must be made with knowledge that it was false or with reckless disregard of whether it was false or not. *Davis vs. Borskey*, 94-2399 (La. 9/5/95); 660 So.2d 17.

Further, recovery by plaintiff is precluded if it is shown that the statement was true or that it was protected by a privilege, absolute or qualified. *Arledge vs. Hendricks*, 30,588 (La. App. 2nd Cir. 6/26/98); 715 So.2d 135, 139.

Plaintiff sets forth in his opposition memorandum that an action against defendants for defamation exists regarding the "allegation of racist behavior" "especially in the context of an election run." Plaintiff has failed to prove that the statements were made with the knowledge that the information was false. Mr. Fox admitted that the statements in the anonymous letter for Weeks 2, 3, 5, 6 and 8 were based on events that Mr. Fox had been subject to an investigation. *(Dep. of Ricky Fox, pg. 85 - 100)* Further, Kenneth Delcombre provided testimony that he provided the information regarding Weeks 1,4,6,7,8. Thus, plaintiff can not prove the statements were made with knowledge that they were false.

Plaintiff has also failed to show an unprivileged publication to a third party. Ricky Fox admitted that he had no information to indicate that the Budwine incident was provided to the media. *(Dep. of Ricky Fox, pg. 65, lines 17-25)* Mr. Fox admitted that neither the anonymous letter nor the complaint arising from the Joe Budwine incident were ever printed in the newspaper. *(Dep. of Ricky Fox, pg. 102, lines 15-25)* Mr. Fox also confirmed that he did not have any information that Mr. Vice, Mr. Cary or Mr. Phillips put any information out to the general public regarding the letter or Budwine incident. *(Dep. of Ricky Fox, pg. 183, line 10 - pg.*

184, line 31) Additionally, Billy Ray Vice only provided a copy of the incident report after it was requested by Eric Cormier with the newspaper. The incident report included the complaint by Joe Budwine as well as the complaint by Ricky Fox. Ultimately, Mr. Cormier did not publish anything regarding this incident in the newspaper. *(Dep. of Billy Ray Vice, pg. 108, line 3 - pg. 110, line 5)* Thus, the incident was only published in regard to an incident report which the police department was required to prepare in response to the complaint by Joseph Budwine. Defendants are immune to a defamation action pursuant to LSA-R.S. 9:2781 (set forth below) since the incident report was prepared in regard to discretionary police activities. There is no evidence to show that the incident report was prepared to include any false information, but was merely prepared in regard to the complaint and statement provided by Joseph Budwine as well as the phone complaint submitted by Ricky Fox. In summary, plaintiff has failed to prove defamation on the part of Billy Ray Vice or Troy Cary.

C. Statutory Immunity under LSA-R.S.9:2798.1

As set forth above, there is no evidence to show that Troy Cary or Billy Ray Vice conspired to have Joseph Budwine make a false statement. The evidence merely shows that Joseph Budwine made a complaint to the police department and prepared a voluntary statement stating that Ricky Fox did make a racial comment. LSA-R.S.9:2798.1 provides immunity for policy making or discretionary acts or admissions of public entities whether officers or

employees. Specifically, Section B states the following:

> Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy making or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

Troy Cary and Billy Ray Vice were certainly acting within their discretionary function to take the information from the citizen, Joseph Budwine, regarding his complaint and voluntary statement. Further, they were entitled within their discretionary authority to prepare an incident report regarding the complaint by Joseph Budwine. The incident report included not only the complaint by Joseph Budwine but the complaint by Ricky Fox against Joseph Budwine. Even if it were determined that the racial comment was not made by Ricky Fox, Mr. Vice and Mr. Cary were within their discretion to take the complaint by Joseph Budwine that such a statement was made and take his voluntary statement. Plaintiff cannot impose fault on the part of the officers for the simple act of taking the complaint and processing an incident report. Plaintiff has provided no evidence to show at the time that the complaint was made to the Vinton

Police Department, there was any evidence to show that Joseph Budwine was making up the racial statement by Ricky Fox. It was only after this litigation, that the defendants learned through the testimony of Ricky Fox that he believed Joe Budwine was extremely high and would not even have remembered what he said at the basketball game. *(Dep. of Ricky Fox, pg. 49, lines 7-10)* Thus, defendants are entitled to immunity for any discretionary acts regarding the incident report prepared in regard to the complaint by Joseph Budwine and any claims by plaintiff should be dismissed.

D. No Vicarious Liability for Defamation by the Town of Vinton

As set forth above, defendant is not vicariously liable for any claims arising from the anonymous letter and thus any claim for defamation should be denied.

In regard to the defamation action for the incident report prepared in response to the complaint by Joseph Budwine, defendant also submits that it has no vicarious liability. Where an act of an employee is illegal, the employers is only liable when it is proved that they might have, but did not prevent the act. *Duncan vs. Hawks,* 18 La. 548 (1841) In *Russell vs. Noullet,* 1998-0816 (La. 12/1/98); 712 So.2d 868, a police officer was acting outside the course and scope of his employment when he assaulted a bystander, and thus, the city was not vicariously liable for the officer's conduct where the officer's purpose was not to compel

bystander to comply with valid police order or to protect anyone from harm by that bystander. But rather, the purpose was purely personal and motivated by a desire to harm the bystander because the bystander announced an intent to report a fight involving the police officer's brother. The court determined the assault was totally unrelated to his official duties.

In *Bates vs. Caruso,* 2003-2150 (La. App. 4th Cir. 7/28/04); 881 So.2d 758, a police officer's intentional sexual abuse of a mentally challenged 15 year old victim was not sufficiently employment related to impose vicarious liability upon the city even though the officer was involved in a police sponsored scouting program. The court determined that the officer's crime was committed outside of working hours and that there was no employment related basis existing for overnight visits by the victim at the officer's home and the city had no knowledge of the officer's propensity to abuse teenage boys.

Any allegation by plaintiff that Cary or Vice orchestrated and convinced Joseph Budwine to make a scene at the basketball game and assert that Ricky Fox made racial comments would not be in the ambit of the job duties of Cary and Vice. This would not be an incident subsequent to a normal police procedure. Certainly, these actions alleged by plaintiff cannot be deemed as within the assigned duties of the officer and certainly cannot be deemed to be furthering the objective of the Town of Vinton. Thus, plaintiff's claims against the Town of Vinton for

vicarious liability for defamation should be dismissed.

IV. CONCLUSION

Defendant requests this Court exercise its authority to maintain supplemental jurisdiction and dismiss the plaintiff's state tort claims against the Town of Vinton.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX — CIVIL ACTION NO.: 2:06-CV-135

VERSUS

BILLY RAY VICE, ARTHUR PHILLIPS, TROY CARY AND THE TOWN OF VINTON — JUDGE MINALDI — MAGISTRATE JUDGE WILSON

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY'S FEES AND COSTS

* * *

Defendants submit that plaintiff had numerous opportunities to dismiss the federal 1983 claims against the defendants. Certainly at the time this matter was removed from state court by filing of the Notice of Removal of January 25, 2006, the plaintiff could have acknowledged that the federal claims were baseless and without merit and voluntarily dismissed the federal claims thus remanding the proceedings to state court.

* * *

Defendant submits that the case involved depositions of the parties and witnesses which were very lengthy regarding the issues at hand.

Defendant submits that the total pages for the following transcribed depositions of the deponents are as follows:

1. Joseph Budwine – 110 pages

2. Arthur Phillips – 162 pages

3. Ricky Fox – 200 pages

4. Billy Ray Vice – 136 pages

5. Troy Cary – 121 pages

Further, the case involved review of the criminal investigation of the Federal Bureau of Investigation and Louisiana State Police including their voluminous investigatory records as well as listening to FBI wire tape recordings and transcripts of wire recordings. The case also involved review of the state criminal trial regarding representation of a municipality given the contact with the municipality through its mayor as well as multiple board of aldermen. This case involved multiple parties and multiple attorneys which ultimately increases the time involved by attorneys. Finally, this case was protracted over a long period of time due to the pending state criminal proceedings against Billy Ray Vice and his Fifth Amendment right to forego questioning through depositions in these civil proceedings. Thus the parties did not obtain the deposition testimony of Billy Ray Vice until following the state criminal court proceedings.

* * *

[Stamey & Miller, L.L.C. Letterhead]

August 21, 2006

Mr. Steven Broussard
Broussard & Hart, L.L.C.
1301 Common Street
Lake Charles, LA 70601

Re: Ricky D. Fox vs. Town of Vinton, et al
Case No. 2:06-cv-135, U.S. District Court,
Western District of Louisiana

Dear Steve:

In accordance with our prior conference, I advised you that it was our position on behalf of the Town of Vinton that the Town had no liability in connection with the above referenced matter. The following is my summary of applicable law in support of our position.

In order to prevail against a municipality in connection with an alleged civil rights violation, a plaintiff must show that the municipality caused the deprivation of the plaintiff's constitutional rights as a result of an identifiable municipal policy, custom or direction. *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Piotrowsky v. City of Houston*, 237 F.3d 567 (5th Cir. 2001); *Board of the County Commissioners of Bryan County, Oklahoma v. Jill Brown*, *520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)*; *Touchton v. Kroger Co.*, 512 So. 2d 520 (La. App. 3d Cir. 1987). In fact, *Monell* sets the threshold of proof at a high

standard by stating that the policy must be the "moving force" behind the violation.

There are no facts that show that plaintiff was damaged by any policy or custom of the Town of Vinton. Moreover, liability under §1983 cannot be premised upon the theory of *respondeat superior*. *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Piotrowsky v. City of Houston, supra*; *Thompkins v. Belt*, 828 F.2d 298 (5th Cir. 1987).

Based upon the above referenced law, plaintiff has not stated a claim against the Town of Vinton upon which relief can be granted; accordingly, we respectfully submit that the plaintiff's claims against the Town of Vinton should be dismissed, with prejudice.

After you have reviewed this letter, please contact me to discuss this matter with me further.

Sincerely yours,

JOSEPH B. STAMEY

JBS:mhy

January 24, 2007

Mr. Joseph Stamey
Stamey & Miller, LLC
727 Second St. -
P. 0. Drawer 1288
Natchitoches, LA 71458-
1288

Mr. Michael D. Hebert
Milling, Benson,
Woodward, LLP
101 LaRue France,
Ste. 200
Lafayette, LA 70508-
3138

Mr. Terry D. McCay
Kean, Miller,
Hawthorne, et al
One Lakeshore Dr.,
Ste. 1600
Lake Charles, LA 70629

Mr. J. Scott Thomas
Louisiana Municipal
Assn.
P. 0. Box 4327
Baton Rouge, LA 70821

Mr. Andre' J. Buisson
Woodley, Williams Law
Firm, LLC
500 Kirby Street
P. O. Box 3731
Lake Charles, LA 70602

Re: Ricky D. Fox Vs. Billy Ray Vice, et al
U.S. District Court Docket No. 06-135

Dear Gentlemen:

This case has been close to the "back burner" for long enough. I've taken a hard look at what can be proven by affidavits from my client, State Trooper Kent Peveto, and FBI Agent Joe Duenas, including documents that can be identified and attached to the affidavits (e.g., fraudulent incident report and

anonymous, threatening letter) and believe I could make out a good *prima facie* case of liability against all involved, including the Town of Vinton. I have a hard seeing how the Defendants could truthfully sign countervailing affidavits.

Before I go through the effort to put together a dispositive motion directed at liability, I thought I would write All involved and suggest that everyone participate in a good-faith mediation at my office and use as a mediator Andy McGlathery or Bernard McLaughlin.

I would appreciate each of you giving the matter some thought and letting me hear something within two weeks as to whether or not your respective clients are interested in mediation. Depending on the response, I will either go forward with setting up the mediation or will put together my liability motion.

For what it's worth, I considered whether or not percentages of fault on each Defendant would be a problem in a liability motion and decided that, that was not a problem because the Defendants acted in concert and intentionally, thereby rendering each liable insolido; certainly that will be my approach.

Sincerely,

STEVEN BROUSSARD

REH/rmk
cc: Mr. Ricky Fox, w/ enc.

August 24, 2007

Mr. J. Mark Miller
Stamey & Miller, LLC
727 Second St. -
P. 0. Drawer 1288
Natchitoches, LA 71458-1288

Mr. Gregg A. Wilkes
Cook, Yancey, King & Galloway
333 Texas St., Suite 1700
P. 0. Box 22260
Shreveport, LA 71120

Mr. J. Scott Thomas
Louisiana Municipal Assn.
P. 0. Box 4327
Baton Rouge, LA 70821

Mr. Christopher P. leyoub
Plauche', Smith & Nieset
P. O. Drawer 1705
Lake Charles, LA 70602

Re: Ricky D. Fox Vs. Billy Ray Vice, et al
U.S. District Court Docket No. 06-135

Dear Gentlemen:

I just finished dictating Plaintiff's reply memorandum to Defendants' opposition to Plaintiff's summary judgment. It caused me to reflect on the facts of this case. I must say that I will buy each of you the biggest steak in town if Vice and the Town of Vinton can "walk" on this one. Plaintiff may have some "color of law" problems on the extortion letter, but when it comes to the basketball game incident and the false police report, etc., I say the Town of Vinton is "cooked;" as for Vice, he'll be twice "cooked."

In my humble opinion, the further this case goes the harder it is going to be to settle because it certainly isn't getting any cheaper from Plaintiff's viewpoint. If the Defendants realistically think there

is any chance they can "walk" on this case when the day is over, I believe you better pull your heads out of the sand and look around. If Defendants want to make a reasonable shot at getting this case settled, let's talk.

Sincerely,

STEVEN BROUSSARD

SB/rmk
Enclosure

March 8, 2007

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. P.O. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs. 06-135
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

You will recall that before the recent depositions Troy Cary's attorney, Scott Thomas, took the position in a letter to me that while he thought mediation was a good idea, he didn't see any reason for his client to participate because there was no evidence against Cary. After the depositions, I doubt that Scott Thomas will be making any more statements along those lines - the involvement of Troy Cary is clear. Troy Cary, among other things, dictated Joe Budwine's statement and obviously orchestrated a lot of the game plan against Ricky Fox.

At this point, other than taking the deposition of Troy Cary, nothing can be done until Vice's criminal trial. At that point, we will be able to depose Vice and the investigators.

Joe, again, I think we all know where this is headed, and like a sore that goes without treatment, the longer it sits around and festers I believe the harder it is going to be to get this case settled short of trial. Ricky Fox sat through the depositions the other day, and now I believe his anger, and accordingly, his expectations have risen. I believe it would be best for all of us to by to get this matter resolved. If you have any influence over the others regarding mediation, please exercise it now.

Sincerely,

STEVEN BROUSSARD

SB/rmk

P.S. I remind you while we have generally only talked about the fraudulent confrontation and incident/arrest report, the evidence against Vice regarding the extortion letter is overwhelming and airtight. There are two parts to this case, and neither are good for Vice, but at least if we get things moving towards a mediation now, there are some other people that might share in the pie

SB

[Broussard & Hart Letterhead]

April 18, 2007

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. - P. 0. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs. 06-135
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

Last Friday, April 13th, a jury convicted Billy Vice of extortion. I am doing some research to hopefully support my belief that this criminal conviction will support a Motion for Summary Judgment in our federal civil proceedings; if it will, then I intend to file the Motion.

Joe, every time that we talk I get the feeling that you are going to initiate some action to get this case moving, but nothing significant has happened. Perhaps like a lot of good lawyers, there are other hotter irons in the fire; if that's true, then I think this iron is now getting ready to heat up and needs some attention. Certainly things are not likely to get any better from the defendants' standpoint as this case progresses toward trial.

My point is if your client is serious about getting this case resolved, circumstances are not likely to improve beyond this point. The more work that I do on this file, the higher my evaluation is naturally going to go.

Sincerely,

STEVEN BROUSSARD

SBjkb

cc: Mr. Ricky Fox

[Broussard & Hart L.L.C. letterhead]

May 12, 2006

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. - P. O. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs.
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

Please remember to send me a copy of the case that we discussed that holds there is no vicarious liability on behalf of an employer/city for the acts of someone such as a police chief.

Also, please send me a certified copy of the Town of Vinton's policy so I can verify there is no coverage for intentional torts.

Sincerely,

STEVEN BROUSSARD

[Broussard & Hart L.L.C. Letterhead]

May 30, 2006

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. - P. O. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs.
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

My client is interested in getting this case resolved as quickly as possible, but before exploring early settlement any further, we need to see the case law dealing with the "lack" of vicarious liability on the part of the City/Town for the actions of its Police Chief.

Beginning June 1st, for a couple of weeks, if you need to reach me please do so at (970) 878-0885, which is our cabin in Colorado.

Sincerely,

STEVEN BROUSSARD

[Broussard & Hart L.L.C. Letterhead]

June 14, 2006

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. - P. O. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs.
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

This will serve as a followup to my May 12, 2006, wherein I reminded you to send me a copy of the case that we discussed that holds there is no vicarious liability on behalf of an employer/city for the acts of someone such as a police chief.

Also, please send me a certified copy of the Town of Vinton's policy so I can verify there is no coverage for intentional torts.

Sincerely,

STEVEN BROUSSARD

SB/rm/rmk

[Broussard & Hart L.L.C. Letterhead]
July 13, 2006

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. - P. O. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs.
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

This will serve as a followup to my May 12, 2006, and June 14, 2006, letters wherein I reminded you to send me a copy of the case that we discussed that holds there is no vicarious liability on behalf of an employer/city for the acts of someone such as a police chief.

Also, please send me a certified copy of the Town of Vinton's policy so I can verify there is no coverage for intentional torts.

Sincerely,

STEVEN BROUSSARD

SB/rmk

[Broussard & Hart L.L.C. Letterhead]

July 17, 2006

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. - P. O. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs.
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

Please take some time to convince me that the Town of Vinton has no liability for the actions of its former Police Chief, Billy Vice. If you'll do this, I'll follow your recommendation and try to get the case settled with all Defendants (except perhaps for Vice) once I am satisfied of the non-liability of the Town of Vinton.

Sincerely,

STEVEN BROUSSARD

SB/rmk

cc: Mr. Ricky Fox

[Broussard & Hart L.L.C. Letterhead]

August 13, 2006

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. - P. O. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs.
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

This will serve as a followup to my previous letters wherein I reminded you to send me a copy of the case that we discussed that holds there is no vicarious liability on behalf of an employer/city for the acts of someone such as a police chief.

Also, please send me a certified copy of the Town of Vinton's policy so I can verify there is no coverage for intentional torts.

Sincerely,

STEVEN BROUSSARD

SB/rmk

[Broussard & Hart L.L.C. Letterhead]

November 21, 2006

Mr. Joseph B. Stamey
Stamey & Miller, LLC
727 Second St. - P. O. Drawer 1288
Natchitoches, LA 71458-1288

Re: Ricky D. Fox
Vs.
Billy Ray Vice, et al

Your Client: The Town of Vinton

Dear Joe:

In conversation and correspondence you have indicated that you did not think the Town of Vinton had any vicarious liability for the acts of its Police Chief, Vice; my research discloses otherwise. In Koziol v. Hanna, 107 F.Supp2d 170 (N.D. N.Y. 2000), one of the issues involved whether or not a city could be held vicariously liable for the acts of its mayor. The court stated that in order for a municipality to be liable, the plaintiff must prove that the defendant's acts amounted to a policy or practice the municipality had adopted. The policy must be officially adopted and promulgated by that body's officers. The decisions of officials whose acts or edicts may fairly be said to represent official policy may lead to municipal liability. The court went on to hold that the mayor of the city qualified as a policy making authority such that the city would be vicariously liable for his action in issuing a gag order

that restrained the speech of all employees of the city.

Certainly the Chief of Police would seem to be a high enough ranking official with the city such that his decisions would represent "official policy."

In the case of Roma Construction Co. v. Russo, 96 F.3d 566 (1st Cir. 1996), the court set forth a two part requirement for maintaining a 1983 action against a

November 21, 2006
Page 2

municipality grounded upon unconstitutional municipal custom. First, the custom or practice must be attributable to the municipality. That is, it must be so well settled and wide spread that the policy making officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice. Second, the custom must have been the cause of and the moving force behind the deprivation of constitutional rights. The court went on to state that an unconstitutional policy or custom may be inferred from a single decision or act, but the isolated action must be taken by a municipal official with final policy making authority in the relevant area of the city's business. In this case the mayor was extorting bribery payments from developers in order for their development to be approved. The court said that the actions of the mayor in coercing these bribes was sufficient for a trier of fact to infer unconstitutional

policy or custom with respect to the town's government.

In our case, clearly Vice was acting in the area of authority of the Chief of Police when he threatened Fox with the anonymous letter and when he arranged to have false charges filed against Fox.

* * *

I also did some research on qualified immunity and I am satisfied there is no chance that Vice can claim immunity under the facts of our case.

So you don't have to get up from your desk and do some research to check out the cases I have cited, I am enclosing a copy of both of the above cases. You'll see that I've highlighted the language upon which I rely.

As you and I have discussed several times, everyone knows where this case is headed and what the ultimate facts are going to be in the final analysis. That being said, we either need to have some serious talks about settlement or get the case moving. Why don't you give it some thought and let me hear from you.

Sincerely,

STEVEN BROUSSARD

SB/rmk
Enclosure

DEPOSITION OF

JOE BUDWINE

RICKY D. FOX

Plaintiff

UNITED STATES DISTRICT COURT

VERSUS NO. 06-135

WESTERN DISTRICT OF LOUISIANA

BILLY RAY VICE, ET AL

Defendant

LAKE CHARLES DIVISION

FEBRUARY 28, 2007 9:30 A.M.

* * *

Q. [10] And what's your date of birth?

A. 11/13/82.

Q. And where do you live?

A. Vinton, Louisiana.

* * *

Q. [11] I'm Randy Hart's partner. We met. I'm Steve Broussard. And I've shot too many shotguns, so my hearing is not very good.

THE WITNESS:

Okay. So, speak a little louder.

MR. BROUSSARD:

A little bit louder.

THE WITNESS:

Okay.

Q (Mr. Hart) And you say you played some college ball as well?

A. Yes, sir. Year and a half. A year and a half.

Q. Of college football?

A. Yes, sir.

Q. What school did you play at?

A. Kilgore College.

Q. Kilgore, is that in Texas?

A. East Texas.

Q. How long have you know my client, Ricky Fox?

A. Long time.

Q. How far back?

A. Since I first started playing sports.

Q. What grade were you in when you first started playing sports?

A. Probably elementary. From elementary on up to --

Q [12] Ricky Fox has been a big fan of yours, hasn't he?

A At one point in time, yeah, he was.

Q. Did you frequently -- did you see Ricky Fox coming to the sports events for Vinton High School sports?

A. Yeah. Have I ever seen him come?

Q. Yeah. Did you ever seen him in the stands there cheering the team on?

A. Oh, yes. Yes, sir. Yeah. I seen him on the side line.

Q. Was he out there supporting the team?

A. Yeah.

Q. Had you ever been over to Ricky Fox's house?

A. Not that I can recall. I -- I been around it. I don't recall like going in. But as far as the yard, yeah, I been with his son and his next door neighbor, Chad. But -- Q. Did you know his daughter?

A. Yes, sir. I know his daughter.

Q. You were friendly with her?

A. Yeah. I'm friends with --

Q. Do you know Ricky Fox's wife?

A. Yeah. I'm real good friends with Ms. Kay.

Q. What did she do? Did she have a job at the high school?

A. [13] Yeah. She worked in the cafeteria.

Q. She made sure you got some good food every day for lunch?

A. She'd try.

Q. She tries within the constraint of what the Calcasieu Parish School Board will give her?

A. Yeah. Yes.

Q. When you say you're real good friends with her, did you interact with her, talk with her all the time?

A. Yeah. When I was in high school, I did. I talk to her about a lot of stuff, problems and this and that.

Q You know, did you ever have any feeling that Ricky Fox had any kind of racial prejudice or problem with you?

A. No. Not really until when I went -- with the incident that happened. Other than that I never -- I never thought he had a problem with me at all.

Q. Do you know the former police chief of the City of Vinton, Billy Ray Vice?

A. Yes, sir.

Q. Okay. What kind of -- tell me about your relationship with Billy Ray Vice. How far did

[14] that go back?

A. Not far at all.

Q. I'm sorry.

A. Not far at all.

Q. How did you meet him?

A. Chief of Police.

Q. I mean, did you meet him in an official capacity because you were, you know, brought in by the police or did he come to you or, you know, how did you meet Billy Ray Vice?

A. I went in -- I went in to the police department.

Q. And when was that?

A. After this incident happened.

Q. Was that the first time that you met Billy Ray Vice was after this basketball game incident?

A. Yes, sir. That's the first time I -- I met him. I mean, I knew him as far as his shop, but other than that, I don't know him.

Q. Your -- I'm sorry. Did you finish that answer?

A. Yeah. Yes, sir.

Q. Am I to understand you've never talked with Billy Ray Vice before you went into the police station after the basketball game incident?

A. Repeat that again, please.

Q. Was the -- when you went into the police station

[15] after the basketball game incident, was that the first time you ever talked with Billy Ray Vice?

A. Yes, sir.

Q. Did Mr. Vice ever tell you that if he was elected Chief of Police that he'd take care of you?

A. Yes, sir.

Q. When did that happen?

A. When I went to talk to him.

Q. When you went to talk to him about

A. About the incident -- referring to the incident.

Q. How did that comment come up? I mean, how did

A. How was it worded, you want --

Q. Well, yeah. How was it worded?

A. I mean, in so many words, it's like -- I mean, after I wrote my statement or whatever and so many words it's like I do the best I can to help you, if you get in trouble, let me know, just – and so, so on.

Q. Where were you when he made that statement to you?

A. In the police station.

Q. Do you know who Troy Cary is?

A. Used to work for Vinton? Troy Cary --

Q. You can tell I'm not very familiar with the folks from the Vinton Police Department. Used to be a policeman.

* * *

Q. [19] Now, in December of 2004 or January of 2005, had you been arrested for some kind of drug charges?

A. Yeah. I want to say January.

Q. January, 2005?

A. Yes, sir.

Q. What kind of charges were those?

A. Distribution -- or so-called distribution and so-called possession in my own vehicle, but I don't own a vehicle.

Q. What kind of drugs were involved?

A. Crack cocaine.

Q. When were you arrested, did they put you in jail?

[20] A. Yes, sir.

Q. And did they set a bond?

A. Yes, sir.

Q. When the bond was originally set, how high was that bond?

A. It was pretty high. I mean, I can't really say how much. I know she had to pay so much to get me out. I mean, from what I know, it was like -- from what I know by -- it was like two hundred forty something thousand dollar bond.

Q. Okay.

A. But -- and I didn't know that, you know. I know it was a high bond. I know it was like a hundred and something thousand dollar bond. But I didn't know it was that high, and I didn't know how it got reduced until I found out.

Q. Well, let's just take it a step at a time.

A. Okay.

Q. You had a high bond?

A. Yes, sir. I had a very high bond.

Q. And were you able to make that bond?

A. Yes, sir.

Q. I'm talking about the high bond?

A. Oh, no.

Q. Did you have some family that was trying to get

[21] you bonded out?

A. Yes, sir.

Q. Who was that?

A. I had an aunt. She's a doctor. She was trying to get me out.

Q. What's your aunt's name?

A. Beverly. Beverly.

Q. Beverly. What's her last name?

A. St. Julien.

Q. Does she live in Vinton?

A. No, sir. She lives in Orange. And my mom.

Q. Your mom lives in Orange, too?

A. No. Mom lives in Vinton, too.

Q. Okay. Do you know who the judge was -- strike that. How long were you in jail before --

A. I got out.

Q. -- you were released?

A. I want to say a week.

Q. Was your bond reduced while you were in jail?

A. It was reduced, I know. Because I know I had -- when I was coming from out of jail they said I need a bond reduction, it's going to cost $500.

Q. Do you remember who the judge was that reduced your bond?

A. No, sir.

Q. [22] Does Mike Canaday?

A. I know Mike Canaday the one -- the one who set the bond, I know. But I don't know who reduced the bond.

Q. Do you know how your bond reduction came about? How did the bond get reduced?

A. I don't know how it came about. That's what I'm saying. It was -- surprised me really.

Q. All right. Do you know if a phone call was made by someone to ask the judge to reduce the bond?

A. No, sir, I don't know.

Q. The bond reduction just kind of came like a bolt out of the blue to you?

A. I know it was a high bond and I -- and I don't know how it got like that. If it was a phone call made, I don't know who made the phone call to get it reduced. But I know my family was there to try to get me out anyway.

Q. Weren't you curious as to what happened to get that bond reduced and get you out of jail?

A. Yeah. I was real curious.

Q. Did you ask anybody about --

A. No.

Q. -- how it came about?

A. Not really. I was just -- was happy to get out.

Q. [23] Did you ever hear that Arthur Phillips went and talked with Judge Mike Canaday about getting the bond reduced?

A. No, sir.

Q. I want --

A. I can recall from what -- from what Ricky told me that somebody had got my bond reduced. But as far as that, I didn't know who. He just told me it was reduced. It had been reduced. So, evidently, it must have been a phone call or something done about it getting it reduced.

Q. Whatever happened to those drug charges that they arrested you on?

A. I went to trial already. Yes, sir.

Q. And how did that turn out for you?

A. They dropped all of them and I pled guilty to one of them -- distribution. And they gave me 18 months in jail. I got from May 9th to turn myself in.

Q. Does that mean you have to report and go to jail for 18 months?

A. Yeah. Well, he was going to do it right then and there, but I have a one-year-old daughter, and he made it convenient for me. He gave me more time to spend with my child.

[24] Q. Who was your sentencing judge?

A. I want to say Savoie. That's who I want to say.

Q. Kent Savoie?

A. Yes, sir.

Q. I'd like to talk to you now about this basketball game incident. I'm going to call it the incident of February 7, 2005. Tell me how that came about, Joe.

A. Okay. I went to the game, right. I had been hearing all -- all through the week, while they was campaigning or whatever was going on before --

Q. Campaign for Chief of Police?

A. Chief of Police, yes, sir. And I been hearing about it all week. Well, right before I went to the game was like -- Fox said he was going to show y'all niggers

what it mean to stay across the tracks when he get in office.

Q. Who told you that?

A. It was -- this was -- this was brought to me from the streets, like from word of mouth from everybody. It was like it's not one in particular person that was saying it.

Q. Did that surprise you when you heard that that

A In a way it really did because in a way I didn't really think he's the type of person towards me --

* * *

[26] Because I can remember that Cary -- Troy. I remember when it was going on and he was -- he was saying that to like put it in the Lagniappe paper and this -- get with this -- this people and this person.

Q. This was before you went to the basketball game?

A. No. This is after this.

Q. Oh, I see.

A. This is after the game that Troy and it's like, well, something need to be done about it.

Q. Troy Cary suggested to you that something needed to be done about it?

A. Yes, sir.

Q. And what did he suggest needed to be done?

A. He said that I needed to get with the NAACP or put it in the Lagniappe magazine or Gumbeaux magazine or something. Something need to be done about it.

[27] In other words, on black and white or in the paper, whatever. In other words, that's what he was trying to say in so many words.

Q. He suggested Lagniappe magazine ought to get a hold of it?

A. Yeah. Like he -- something like that. Because I told him I had a cousin work for the Gumbeaux magazine.

Q. Gumbeaux?

A. Yeah. And he was like, well, you need to -- something need to be done about it. I mean, --

Q. He suggested you contact the NAACP?

A. Yeah, he -- well, he didn't suggest it. He asked me did I knew anybody that was affiliated with NAACP, and I told him, yes, I did.

Q. Did he suggest anything that you do with your contact at the NAACP? Did he suggest you need to go talk to them?

A. Yeah. He say you go talk to them and see how it goes from -- from -- because something he said like in other words, it shouldn't be said, and something

need to be done about it because it's a small town, in other words, he was saying. And we don't need that type -- that type of conflict in a small town like Vinton.

[28] Q. Did he suggest you call or contact anybody from the Lake Charles American Press or TV?

A. He tried to do American Press, but I told him I wasn't going through all of that.

Q. You say he tried?

A. He tried to get the American Press involved and this and that. As a matter of fact, I want to say probably was in the American Press, if I can recall.

Q. What do you know about Troy Cary trying to get it published in the American Press? What did he do?

A. Like -- explain.

Q. What did Troy Cary do? You said he tried.

A. He tried to get me.

Q. Oh, he tried --

A. No, he didn't try. He tried to get me to put like -- like put like an article or statement or something in the American Press.

Q. Did he suggest you call them?

A. He tried -- he suggested me to contact whoever I can, NAACP, Lagniappe, all this.

* * *

[29] A. wasn't on my ears. I had them like right here.

Q. On your temples?

A. Yeah. Like that. That's how I had them.

Q. And did you hear Mr. Fox make this statement that you had heard he was making in the community?

A. Yes, sir.

* * *

[31] A. Yes, sir.

Q. And you were going to the basketball game to see Mr. Fox about that. Is that true?

A. That's true.

Q. Since you had a past relationship with Mr. Fox, I mean, you knew him and he -- he'd never been hostile to you before, right?

A. He never mis -- never mistreated me at all.

Q. Did you ever think about just going to him man-to-man and say, Mr. Fox, this is what I heard been going on in the community?

A. No. That was so long. I mean, I -- I would talk -- he called me in his office and we had talked about it. I said -- I mean, it surprised me that I was hearing it, you know, to be so close to be -- for him knowing me as long as he known me. I mean -- and I -- I made the statement. It came out of my mouth, I told -- like exact words at the game, I was like -- in high school I was like a Jerry Rice or a Terry or this and that and I said, "I can't believe it would come out your mouth, you'd even say something like that about us black people or whoever, you know."

Q. Where did you tell Mr. Fox that? Where were you?

A. That's when -- I want to say he's assistant

[32] principal or principal then. When he was escorting me out, we was steady arguing -- I was steady talking as I walked out. And I was like -- when I was in school, wasn't none of this, you know. I was the big man on campus, in other words. And I said, "It's a surprise -- I can't believe it's being said." I mean, to be Chief -- I can't believe it's being said by anyone. I don't care black or white. I mean, I feel like, you know, like I said once before, I see no color. I mean, we all -- the way I look at it, we all equal.

Q. You told us that you had heard on the street that Mr. Fox was making insensitive comments.

A. Yes, sir.

Q. The same exact insensitive comment that you overheard him at the basketball game?

A. Yes, sir.

Q. And --

MR. BROUSSARD:

What you need?

THE WITNESS:

Nothing.

MR. BROUSSARD:

If you need anything, you tell us.

[33]

THE WITNESS:

Oh, okay.

Q. (Mr. Hart) Well, who was the first one at the basketball game, was it you or was it Mr. Fox?

A. No. He was there first. I got there like in -- like the end of the third quarter, right at the beginning of fourth quarter.

Q. Mr. Ricky Fox goes to a lot of the basketball games?

A. He goes to all of them.

Q. You go to a lot of them, too, right?

A. Yeah. I -- yeah, I go to a lot of bas I got to

[33] a lot of sports events, period.

Q. When Ricky Fox went to basketball games, did he always sit just about in the same place?

A. No, not really. Usually he'll stand on the rail, something like that, or stand by over -- sit where they keep the score. I mean, he move around from time to time, you know.

Q. When you came to the basketball game, did you purposely -- you know, on purpose -- sit close to Mr. Fox?

A. It wasn't purposely. I sat where my friends were sitting.

Q. It just so happened to be --

A. [34] Where he was sitting at.

Q. A couple of rows?

A. People -- like when he explained to me, he – he thought people sent me out for him to hear him say this. No. But just so happened that's where -- that's where Boo -- there's a dude named Boo. That's where they was all sitting at, right there.

Q. All right. And you had some earphones on.

A. Earphones.

Q. Okay. But they weren't in your ears?

A. No. They weren't in my ears.

Q. Did you leave the earphones out of your ears so you could be sure to hear what Ricky had to say?

A. It wasn't even on. It wasn't playing.

Q. I understand that.

A. Yes, sir.

Q. But did you leave them out on purpose just so you could hear what was going on behind you?

A. In front of me. Yes, sir.

Q. Oh, in front of you?

A. Yeah. Because I sat above him.

Q. Oh, you were in front of -- you were behind Ricky?

A. Yes, sir.

Q. How many rows behind Ricky were you?

A. Probably one or two.

* * *

[35] A. Yeah. And as -- like -- like -- I want to say like two minutes before the game was over, we got to walking out, and that's when me and -- I mean, me and Ricky had words. And I was like, I can't believe this is going on. I mean, you know, I can't believe it would be said. And that's when the principal escorted me out and told me just leave and this and that.

* * *

[42] A. was walking out the double doors, and I was like I can't believe he's -- I mean, he's like this around here. I mean, I didn't think -- it turned to this situation.

Q. And when you got loud were you saying things? I mean, were you talking sentences and using words? What were you saying?

A. Oh, yes, I used words. I was like, "Man, I can't believe -- I mean, it would come out of a man's mouth that watched me grow up from yay high from knee high, watched -- know everything I've ever done."

Q. So, Ricky makes a comment and you hear it and you get mad. It upset you.

A. Yes, sir, it really upset me.

Q. How many seconds went by before you started to get loud?

A. I don't know exactly --

Q. Like one one-thousand, two one-thousand, three one-thousand --

A. I mean, I -- you know, I --

Q. Was it within a minute?

A. I'd say within a couple of minutes. I mean.

Q. There's only a couple of minutes left in the game. I know there's time outs and everything, but

[43] A. Yeah, I know that. So, yeah, you -- you're about right. About an estimate -- it's about around that time.

Q. And what was the first thing out of your mouth that was loud?

A. "I can't believe -- I can't believe it's being said like that because you're running for Chief." And I say -- and I said it loud and clear. I said, "Regardless who runs for Chief of Police, color shouldn't matter." And that was the exact words came out of my mouth. And I told that to the -- I mean, like I told him, I say, "I was raised by a white person." I say, "Color shouldn't matter." And I say, "It really disappointed me to hear that it came from him and he knowing me like he knew me." I mean, he helped me -- I mean, growing up, he -- he helped me in so many ways, you know, to stay out of trouble. He always gave me advice, stay out of this trouble, stay out of that trouble. Stay away from this crowd, stay away from that crowd.

Q. When you made this comment, it was loud and clear, correct? Is that what you just told us?

A. Yes, sir.

Q. Could Ricky Fox hear it?

[44] A. (No response.)

Q. When you were in the stands and you heard Ricky Fox make this derogatory comment and you sat and it made you mad for about a minute or two minutes, and then you got loud, and you said I can't believe that you'd make this statement, you know, if whoever's elected Chief of Police shouldn't have anything to do with race, something to that effect?

A. Yeah.

Q. Did you say it loud enough so that Ricky Fox could hear it?

A. I think I did because I -- if I can recall, I think he said something when I said like, no, Joe, that did not come out of my mouth or something like that.

Q. Then did he turn around and look at you?

A. No. This is as -- this is as I'm, you know, leaving the -- fixing to leave the game.

Q. Well, I

A. As I'm walking down the stairs, I'm talking -- that's when -- as I'm walking down from where I'm at, as I'm walking down the stair, that's when I'm getting louder now.

Q. All right. So, when you were in the bleachers and

[45] you heard the comment, you didn't start getting loud while you were sitting in the bleachers? A. Right. No. Everybody -- see, the people I went -- the crowd I went with, we all stood up and stood on the rail right before the came was done. And that's when I got loud.

Q. Who's the crowd you were with?

A. Rodrick Debruce (ph) and whole bunch high school boys.

Q. Who else besides Roger -- how did you -- Debruce?

A. Rodrick.

Q. Rodrick?

A. Yeah.

Q. Debruce?

A. Debruce.

Q. Debruce. Did he graduate with you?

A. No, no, no. He's still -- he's still in school now. He's -- he's a junior in the school now.

Q. Who else besides you and Rodrick?

A. I can't really name all of them. I know it was me and him for sure because that's who walked out with me.

Q Can you name anybody else besides you and Rodrick that were there on that bleacher with you when Ricky made this comment?

A. [46] I'm trying to see who's with me and Rod -- with me and Boo. I -- I can't think -- I just can't think of all the people. I mean

Q. Did Rodrick hear the comment as well?

A. I'm going to say yeah. Because Rodrick was like, "man," that's -- his exact words is like, "Man, that's fed up." That's the exact words. And I -- and I

said -- I told him, I say, "I feel the same way," I said, "I feel it's real messed up."

Q. You need some water?

A. No.

Q. You and your friend heard it. And then the basketball game ended, and then you were going to leave, or did you decide to leave before the end of the game?

A. No. I didn't decide. They decided for me to leave.

Q. Who decided?

A. The principal.

Q. Okay. See, that's why I'm confused. Because the principal wasn't -- what attracted the principal to you? What was -- how did he --

A. How did he come about?

Q. Yeah. How did the principal come out there to pull you out of the game?

A. [47] From -- from the loudness. From my voice.

Q. So, you were yelling?

A. I wasn't yelling, but from my voice -- my tone of voice. He -- the principal know me, how I am, my attitude.

Q. Where was the principal when all this --

A Where was he?

Q. Yeah.

A. I don't know. I don't know. I can't tell you the slightest idea where he came from. I want to say he was standing at the -- like in between like the home and the visitor bleachers, in between the hallway when you're walking up, coming from the concession -- I want to say that's where he was. Because I hadn't the slightest idea where he came from. And all I can remember, him -- him saying, "Joe, I'm going to need you to leave," like that. And my words was, "Why me leave. If takes two to make one. It takes two to argue."

Q. Well, Ricky made this comment to the person that was sitting -- to this man that was sitting next to him. Was it a loud comment so that it could be heard by --

A Everybody? No. I wouldn't say that. I wouldn't say he was saying it like -- like that and just

[48] disrespect, you know, everybody.

Q. Was it just a normal tone of voice, he said, if I'm elected Chief of Police,

A. It's like we're talking now.

Q Okay.

A. It ain't amongst the whole gym would hear what he's saying.

Q And the setting in the gymnasium -- correct if I'm wrong -- it's pretty loud anyway. People are

yelling for the team, right?

A. Yes, sir.

Q. When you started -- you got loud. How was your loud comment different from the rest of the noise that was being made so the principal would come up there and say, "Joe, you're going to have to leave?"

A. That's what I say. He -- that's what I say, he must have -- he had to be standing right there at the -- at the -- in between the bleacher – in between the home and visitor. Because I know where he just came and said, "I'm going to need you to leave." He said, "I'm" -- he grabbed me, and said, "I'm going to need you -- I'm going to have to escort you out." I say -- I say, "I don't feel it's right," is the way -- is what I said.

[49] say, "I don't feel it's right." That's exact words came out of my mouth. I said for -- I said, "I have all the right in the world to say what I want to say, but I don't feel it's right for a person to say because they -- is campaigning for a person to say, 'when I become Chief or whatever' that you going to show us blacks what it means to stay across the track." Because I told the principal, that's -- that's been over with. mean, you know.

Q Okay.

A I mean, some people still live their life but like I told him, "I -- it's been over with." I never lived that life. Where black and white have to pick and choose about that.

Q The comment that you made, whatever loud comment that it was, you told us, did you make it one time or did you just -- or was it this repetitive, continuous loud comment?

A In the gym you talking about?

Q Yeah. When you're sitting in the bleachers behind Ricky, but before the principal comes up, did you just make the loud comment one time, this isn't right

A No, like I said -- like I said, we was standing on

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[56]

came out of my mouth.

Q All right. So, I'm just thinking -- I'm trying to put myself in your shoes. I've just heard somebody make some racial comments that upset me. And then I got kicked out of a basketball game because I tried to do something about it. I'm pretty upset about it right now. Were you upset?

A. Oh, yeah. And I'm still upset to this day because

Q So, you went immediately down to the Vinton Police Department to swear out a complaint, right?

A. It was the -- it was the next -- I want to say a day or two when I went down there.

Q. How did you get down there?

A. The first time? I walked -- the first time I went in by myself. And Billy Ray wasn't there. And then the next time -- I left -- I left a message and told that I was there to talk to him – to Billy Ray. And then -- and that's when I came back. When I came back, that's when the officer came and picked me up and brought me.

Q You didn't go down to the police department that night, it was the next day.

A. Yeah.

Q. And you walked down. Okay. Was there any

[57] A. When I walked -- when I walked, he wasn't there at the time.

Q. Who's he? Billy Ray?

A. Billy Ray.

Q. Billy Ray Vice.

A. Yes, sir.

Q. All right. Was there anybody there at the police department?

A. Yeah. The dispatchers. I mean, them.

Q. Were other officers available?

A. I want to say I don't -- I want to say Troy was there, something like that.

Q. Okay. Did you go down there to make a complaint?

A. Yes, sir.

Q. Why didn't you make a complaint then?

A. I did make a complaint.

Q. The first time you went down?

A. No. Not the first time I went down.

Q. I'm asking you, why didn't you make a complaint?

A. Oh, I don't know. I went down -- really, I went -- when I went down there, I wanted to talk to Billy Ray about it, about just campaign, just this serious type of stuff. And then that's when -- when I went the second time to make my complaint, that's when it was brought about, well, as I was

[58] doing my complaint in words, if you get any trouble, I can help you out in so many ways.

Q You didn't go down to talk -- if I understand right, you didn't go down to make a complaint, you went down to talk to Billy Ray Vice about how this thing might affect the campaign?

A. I was -- I was -- I was -- really, I went in there to see why was it going on like this with the black and white thing. I mean, I don't know. If they was -- I don't know if they was disliking each other or not. And then -- then that's when Troy Cary told me, "Something -- you need to do something about it."

Q You went down to the police station. Billy Ray Vice wasn't there. What did you do when he wasn't there?

A. I left.

Q. Did you leave a message with someone?

A. I left one. I left and went home and told him if I -- to tell Billy I came by.

Q. Who did you tell that to?

A. I want to say a dispatcher. And matter of fact, Troy lived in the -- in the housing authority --in the housing -- two houses down from my sister, and he seen me one day when he was going to work.

* * *

Q. [60] You left a message -- you told us you left a message for Billy Ray Vice at the police station?

A. [61] Yes, sir.

Q. Okay. Did he contact you?

A. Yes, sir, he did.

Q. How did he contact you?

A. He sent an officer to my house to pick me up to bring me back to the police station.

Q. And who was that?

A. I think Arthur Phillips bring me back to the police station.

Q. Where were you when Arthur Phillips found you?

A. I was at my house.

Q. He came to your house?

A. Yes, sir.

Q. Knocked on the door?

A. Well, he didn't have to knock. I was -- we was outside.

Q. And did you know what was going on when he pulled up?

A. I kind of figured -- I kind of figured. I had an idea what was going on.

Q How many days after this basketball game did Arthur come to your house?

A. Like two days after the game. Because I didn't go right at night. It was at night after the game. I didn't go the next day. I probably went like

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[64] Q. was I sure that I wanted to do the statement. He didn't force me, you know, to write the statement

or nothing. He didn't convince me to do it. He asked me is it -- is this -- am I sure this is what I want to do.

Q Well, did he -- was this what he asked you when he was at your house? He said, are you sure you want to write a statement?

A. No. I was telling him I wanted -- I wanted to do it. And he was asking me, "Are you sure that's what you want to do." It's not like he was like convincing me to do it or bribing me to do this and do that. But as I wrote my statement word, it came out of Billy Ray mouth that he can help me in so many ways, come to him. In so many ways, if I get in trouble, he can help me.

Q All right. That's what Billy Ray told you while you were writing your -- making your statement?

A. After I -- yeah, after I finished my statement, and he told me after I shook his hand and left, that's what he told me. That's what was said.

Q. Joe, I'm just trying to clarify what happened when Arthur Phillips pulls up in the police cruiser.

Was he in a police cruiser? When he pulls up to your house?

A. Yes, sir.

[65] Q. Two days after the basketball game. You hadn't given a statement yet. He pulls up there. And you're out in front of the house. Okay. Is that correct?

A. Yes, sir.

Q. I'm reiterating what you told me, so I make sure I understand it. You know Arthur?

A. Yeah, I been knowing Arthur.

Q. You're friendly with him?

A. I'm friendly with all of them.

Q. He pulls up and, you know, y'all greet each other. And then

A. See, I'm the type of person, I see all of them, I stop all of them. I stop them on the road. I don't care where I'm at and I can hold a conversation right then and there.

Q. Arthur's in your yard.

A. Well, he's on -- I live on dead end road.

Q. Okay. He's on a dead end road. Is he in his car and you walk up to him?

A. Yeah, I walked up to him.

Q. And what's the conversation between y'all when you walk to him in the car?

A. I told him, I was like, "I think I just want to

[66] make a statement." And he was like, "Are you sure you want to do this?" He say, "I'm not telling you to do it. It's your decision."

Q. Did you ask him why are you here or are you here for a --

A. I figured --

Q. Did Billy Ray Vice send you down here?

A. I figured he came because, I guess, that he know I needed to talk to Billy for reason, it got back to him that I needed to talk to Billy about the incident that was going on.

Q. Who was the first one to speak, you or him?

A Who?

Q. When you walk -- you know, Arthur Phillips pulls up I was the first one to speak.

Q. You're the first one to speak. What did you tell him?

A That I -- that I was going to file a complaint. And he asked me exact words, came out of his mouth, "Are you sure that's what you want to do?" He said, "I'm not making you. I'm not saying you have to do it. You make your own decision." I said,

"That's the decision I want to do -- I want to make." I said, "I don't" -- I said, "I don't

[67] want to sit up here and tell you, blow it out of proportion. I just don't feel it's right to be -- what was said, shouldn't be said."

Q Did Arthur Phillips carry you down to the police station then?

A. Yeah. I asked him for a ride. I asked him, you know, I asked him to give me a ride. I told him, "I'll walk back. I'll walk back to my house."

Q. Okay. But you rode down there in his police cruiser?

A. Yes, sir.

Q. And when you got to the police station, where did you go then?

A. In the Chief's office.

Q. Is that where you gave your statement right there in the Chief's office?

A. Yes, sir.

Q. I think you told us earlier Billy Ray Vice was there?

A. Yes, sir.

Q. And Arthur Phillips was there?

A. Yes, sir.

Q. And you?

A. Yes, sir.

Q. That was all?

[68] A. Yes, sir. In the room. Yes, sir.

Q. In the room. When you got in there, you know, you had asked to talk to Billy Ray Vice the first time you went down there.

A. Uh-huh (Yes).

Q. You saw Billy in there. Did you have a conversation with him?

A. He asked me what was the incident about and I said, I got the complaint paper. And I wrote my complaint. And when I filled out the thing, that's when he told me -- after I finished filling it out, that's when he told me, If there's anything I can help you with, you let me know, you know. I can -- if you have any trouble, come talk to me and see me and this and that."

Q I'm going to read you some things in your statement here 'and -- well, let me read your statement and see if I have any questions. I want to show you a copy first of all and ask you, is this your handwriting?

A. Yes, sir, it is.

Q. That's your signature?

A. That's my signature right there.

Q. Are you the one that wrote this out, all this here?

[69] A. Yes, sir, I did. That's -- that's the one I -- Rodrick.

Q. Rodrick Randall?

A. Yeah. Rodrick Debruce.

Q. That's the fellow that was sitting with you?

A. Yeah. His last name is Debruce.

Q. Debruce?

A. Yeah. I put Randall because I -- that's I know him -- I know his family as all Randalls.

Q. I'll read this to you and I'm going to ask you some questions about it. "I was sitting at the high school basketball game and Ricky Fox was sitting behind me."

A. Uh-uh (no). He wasn't sitting behind me.

Q. He was sitting in front of you?

A. Yeah. See, he -- I sit high. He don't sit up there.

Q That's just a mistake that we got in the statement then.

A. Okay.

Q. You wrote this, though, didn't you?

A. Yes, sir, I wrote it.

Q. You know the difference between in front of and behind?

A. Yes, sir.

* * *

[74] A. They did not tell me what to write. They told me so many -- Billy Ray told me some words, "I can help you." He say, Any trouble you get in, you come see me." That's exact words came out his mouth.

Q. Joe, didn't you get a little bit of help in some of the suggested words to put in this statement from those folks that were in that room with you in the Chief's office that day?

MR. MCCAY:

Objection. You can answer.

A. Oh --

MR. MCCAY:

I'm not representing you.

Q. (Mr.. Hart) Didn't you get some help from some of the people there, from Arthur Phillips, Troy Cary or Billy Ray Vice, whoever was there, didn't they suggest

MR. THOMAS:

I object as he said

MR. HART:

You can object. I want him to answer the question.

Q. (Mr. Hart) Didn't they suggest --

A. Arthur didn't tell me nothing.

[75] Q. Well, did Billy Ray Vice suggest some things for you to put in this statement?

A. In so many words.

Q. He told you the words?

A. In so many words, how he can help me, if I get in trouble with drugs or whatever, this and that, come see him.

Q. Okay.

* * *

[76] Q. Did any member of your family call Judge Canaday to talk to Canaday about reducing the bond?

A. No. I know they -- they don't -- I know they called bail bondsman and this and that. Now, who called the judge, I haven't the slightest idea. From what I know, from what Ricky told me, that Billy Ray got bond reduction.

Q. Who told you that?

A. This is what Mr. Fox told me. See, he told me -- I didn't know my bond. He told me my bond -- my

bail was at two hundred and forty something thousand.

Q. Yeah.

A. He told me. I didn't know it was that much. I thought it was like a hundred and something thousand. And he the one that told me, well, did

[77] you know that -- he do -- that such and such got your bond reduced. And I really didn't know until he told me that.

Q. You never even talked to Vice until after this basketball game incident, right?

A. Well, but he arrested me, too.

Q. Oh, he arrested you?

A. Yeah.

Q. Is he the one that arrested you while you were in jail --

A. The first time, yes, sir.

Q. And that was Billy Ray Vice that arrested you?

A. Yeah. It was him and Arthur.

Q. Arthur Phillips.

A. They was together, I mean.

Q. And after the arrest, it's your understanding now that Billy Rice Vice is the one that called down for the bond reduction?

A. And I didn't -- I didn't even know that. I didn't know my bond was that high. From what I know when I was in there, I know from what I can recall, my bond was like -- I thought it was like a hundred and ninety something thousand dollars, hundred eighty something, forty something. But when I find -- really found out how much it really was,

[78] two hundred and forty something thousand dollars, I know my family ain't called no judge. Because they not like in to the judges. They was calling bail bondsmen here and there trying to get bond reduction, paying five hundred, saying I should pay five hundred dollars here for a bond reduction, five hundred dollars there for a bond reduction.

Q. who ended up paying your bond?

A. My mom and my aunt.

Q. How much did they pay?

A. I want to say my mamma got off a little over two thousand dollars. Right -- right like twenty-two, twenty-four hundred dollars.

Q. Twenty-three or twenty-four hundred dollars?

A. She came off a lot of money. Her and my aunt.

Q. Do you know of any reason why someone outside your family like Billy Ray Vice would have called down and asked for a bond reduction?

A. No. I didn't know he done it.

Q. You didn't ask him to do it, did you?

A. Heck no.

* * *

[81] A He didn't like say get in the car. I -- I asked him will he bring me up there.

Q. And you said when you got to the police station --

A I signed my statement.

Q -- when you were writing out your statement that Mr. Vice and Arthur Phillips was in the room with you. Are you sure about that, that it was Mr. Phillips in that room and not someone else?

A. No, it was Mr. Phillips and Mr. Vice.

Q. You're sure about that?

A. I'm positive.

MR. MCCAY:

That's all the questions I have.

EXAMINATION BY MR. MILLER:

Q. Mr. Budwine, my name's Mark Miller. I represent the Town of Vinton. Real quick, let me get your date of birth.

A. 11/13/82.

Q. You talked about walking to the police station on the first day after the ball game as well as being transported by Phillips the following day to the police station. Let me ask you: Did you have a vehicle at the time that you drove?

A. I've never owned a vehicle.

Q. I also wanted to clear up some of that home that

* * *

[88] Somebody can pick up sandwiches.

(OFF THE RECORD)

(ON THE RECORD)

Q. (Mr. Miller) Following up to Mr. Hart was questioning you about that statement, and Mr. Hart suggested that Mr. Vice helped you make that statement, helped you come up with some of the language in the statement. You responded that in so many words, he helped you. Correct?

A. Correct.

Q. I want to clarify, though, what you meant by that. Did you mean that Mr. Vice actually told you some of the words to write down on that statement?

A. No, sir.

Q. Did Mr. Vice at any time say this is -- this is what you need to write?

A. No, sir.

Q. When you stated "in so many words," what were you talking about?

A. Well, --

Q. When you said that Mr. Vice in so many words was helping you with the statement, what did you mean by that?

A. As I was writing my statement in so many words he was -- he was telling me, it don't matter what

* * *

[91] Q. Mr. Vice had contacted the judge on your behalf --

A. Yes, sir.

Q. -- and had that bond reduced?

A. Yes, sir.

Q. Who told you that?

A. (Witness points to Mr. Fox.)

Q. Mr. Fox told you that. You're indicating Mr. Fox?

A. Yes, sir.

Q. Has anybody else told you anything to that effect?

A. No, sir. Like I said, I didn't know my bond was that high anyway.

Q. So, you have no --

A. See, what it was, when I -- when I got my – my subpoena for today for to do it, and he asked me you have any idea how your bond got -- how my bond got dropped, and I was like, no, I really don't. And that's how it came about. And I really -- still to this day, I -- I didn't know that bond was that high.

Q. Okay. Let's fast forward. Now, between the time Mr. Vice and Mr. Phillips -- you testified they're the ones that arrested you for your --

A. The drug

Q. -- for your drug offense. Between the time – was that the first time you'd ever had any contact

[92] with Mr. Vice?

A. Yes, sir. That was my first time I ever been arrested.

Q Did Mr. Vice -- did you have any contact with Mr. Vice between that particular time and the basketball game?

A. No, sir.

Q. What about with Mr. Phillips?

A. What you mean by "contact"?

Q. Conversations.

A. Conversation. I mean, I talk -- I talk to Arthur all the time. I mean, I see him and I talk to him on a day-to-day basis if I see him. He'll stop and ask how I'm -- how am I doing and this and that. Is everything all right, you staying out of trouble, stuff like -- like that. But as far as holding a conversation about a certain thing, no, it's never happened.

Q And you never spoke to Mr. Vice after your arrest

A. I speak -- I don't hold a grudge against him.

Q. No, no. But between the time you were arrested and the basketball game, did you have any conversations with Mr. Vice? Did you ever meet him, any phone calls? Had you ever run into him?

* * *

[94] that point, correct?

A. Yes.

Q. And what did you tell him specifically, to the best of your recollection?

A Repeat that one time.

Q What did you tell Mr. Vice at that point to the best of your recollection, when you first met him on the second day after the basketball game?

A. About the incident?

Q. Yes. Or what -- yeah, just generally, what do you recall about what you told Mr. Vice when you first -- when you first met Mr. Vice after the basketball game, what did you say to him? What did the conversation --

A. I asked him -- my exact words, "Was is this all over this campaign?" And he asked me about a statement. And I say, "I'm willing to do anything, you know." Because I want to do it or not because nobody forced me to do it. It's something that I wanted to do because at the time I didn't feel it was right because he been knowing me all my life, and I didn't feel it was right.

Q. Okay.

A. And as I was writing my statements and that's when that came about, you get in any trouble, you just

* * *

[95] A. As I -- as I was doing my statement, he -- he told me, if there's any trouble you get into, let me -- you contact me. If I can do something about it, I can -- I do the best I can to get you out of trouble or such and such.

Q. Now, did you write out your statement in the Chief's office?

A. Yeah.

Q. The first office you went into --

A. Yes.

Q. -- in the police station?

A. Yeah. I

* * *

[100] Q. Okay. The conversation that you had with Mr. Cary where you said that he told you you might want to talk to --

A. NAACP.

Q. -- the NAACP, the newspaper, the magazine.

A. The magazine.

Q. Are you absolutely certain that that was prior to your second visit to the police station?

A. I'm absolutely sure. I'm positive.

Q. But you yourself never told him anything about the

[101] basketball game incident?

A. Oh, he knew. I --

Q. But you never told him anything about it?

A. No.

* * *

[106] Q. You were arrested by Arthur Phillips, did not talk to Billy Ray Vice?

A. When I was arrested?

Q. Correct.

A. No -- yes, sir, that's correct.

Q. A high bond was set and it got reduced.

A. Yes, Sir.

Q. And you still didn't talk to Billy Ray Vice?

A. No, air. And I still didn't know who reduced it.

Q. Don't know who reduced the bond?

A. No, sir.

Q. Sometime after you got released from jail, you went to the basketball game.

A. Well, I got -- yeah. Yes, sir. That's -- that's around the right time. Because I only stayed in jail -- I think I went to jail like -- I want to say February -- I want to say February -- sometime in February. And I got out like a week later.

Q. Got out a week later after --

A. I stayed in jail like a week.

Q. Okay.

A. And that's when the bond -- that's when the bond reduction and all that came about, me getting out

[107] of jail. And that's -- that's how my parents came with the money to get me out. But I didn't know it was two hundred and forty thousand dollars. I didn't know who -- who talked to who about it or nothing.

Q. Sometime after you got released from jail, when the bond was reduced, you went to the basketball game?

A. Yes, sir. That's correct.

Q. Within a week or two after you got out of jail?

A. It was prior to that, sometime around that.

Q. And then you went to the police station the next day to talk with Mr. Vice?

A. Yea, sir. No one was there.

Q. He wasn't there.

DEPOSITION OF

ARTHUR PHILLIPS

RICKY D. FOX Plaintiff	UNITED STATES DISTRICT COURT
VERSUS NO. 06-135	WESTERN DISTRICT OF LOUISIANA
BILLY RAY VICE, ET AL Defendant	LAKE CHARLES DIVISION

FEBRUARY 28, 2007 11:45 A.M.

* * *

A. [23] I been knowing Mr. Billy for years. I worked with his brother before at the police department. See, speak to Mr. Billy. He owned at that time an automotive supply store there, so we would go in from time to time and get parts. We talked to him there.

* * *

[45] Q Well, you'd mentioned wearing a wire. You had become an informant for the state in this case.

When I say "this case," I'm talking about the Fox incident -- the alleged extortion?

A. No, sir, not for the state. Actually, I was doing it in the guidelines of the federal authorities that later led to state police getting involved.

Q. I appreciate that distinction. You were an informant for the federal government in this case?

A. Yes, sir.

* * *

[46] A. When I say everything started happening far as the basketball game with the alleged that Chief Fox made some racial comments. Just things inside of the department I didn't feel was being ran right that would probably cause somebody, not in the long run, but in the short run to go to jail. And I wasn't going to be a part of it.

Q. Why did you think somebody was going to go to jail?

A. Because it's illegal, what they were doing. I been a police officer long enough. I know right from wrong.

Q. What actions were taken that you feel were illegal about the basketball game incident?

A. My personal opinion, I don't know anything about the basketball game. It's just hearsay after.

Q. Tell me what did you hear and who did you hear it from.

A. Well, just hear on the streets that Chief Fox made a racial comment toward Joe Budwine. Then I talked to Chief Fox himself who felt that it was -- it was a setup, you know, to try to discredit [47] him from being Chief of Police. Just different incidents like that.

Q. Well, that's one incident that you told us. What other different incident?

A. Incidents to the fact that was trying to get charges dropped against Joe Budwine in order to cooperate.

Q. What did you hear about that?

A. That his charges would be dropped if he would give statements toward -- a negative statement toward Chief Fox.

Q. Where did you hear that from?

A. Heard it from Troy Cary.

Q. Do you know how Troy Cary found out about it?

A. Through Chief Vice.

Q. Is that what Troy told you?

A. Yes, sir.

Q. That Chief Vice was going to try to get charges dropped against Joe Budwine if Joe Budwine would make a complaint against Ricky Fox?

A. That's correct. Matter of fact, Troy wanted to actually be the one to drop -- to try to have charges dropped against Joe because for some particular reason, nothing that I know of that Chief Fox has ever done to Troy. * * *

[55] A. I arrested Joe on a traffic stop. Because I had heard him in his deposition say that I arrested him, but actually the Task Force, whenever we got together or should I say when I got together with my guys, we contacted other agencies in order to do a raid in Vinton. I think at the time we hit like 10 houses at one time with different officers. When we hit Joe's house, Joe was not home at that time. Joe was later stopped walking down the road by Task Force who didn't recognize him, and he was turned loose. Later, myself and Chief Vice was coming from Lake Charles and saw a vehicle driving erratic on the road, activated the lights and shut it down, and Joe was in the back seat. Of course, he had more narcotics on him. So, he was arrested then.

Q. Were you aware that he had a bond set?

A. He hadn't had a bond set. No. I'm sorry. Yes, he did. I was aware because it was on the warrant itself.

Q. And what was the bond set at, do you recall?

A. I think on both the charges that Joe had -- I want [56] to say about 240,000 total. Well, I want to say about 175,000, I think, on that particular two bonds. But when I arrested him on the other charge, there was an additional bond, so I think it did total up to about 240,000.

Q. You heard Joe Budwine testify that his bond was eventually reduced?

A. That's correct.

Q. Do you know anything about how the reduction came about?

A. I don't -- I don't remember. I'll be honest. I can't say because I have went to the judge with permission from the Chief of Police to get somebody bond lowered. I heard Joe say that officers never went to him and asked him about working or doing undercover. I have went to Joe and asked Joe, would he you work for me. I have talked to Joe on several occasions in the store. "Joe, you out there selling dope, this is your final warning. Stop selling it. If not," -- I'll be a little sarcastic. I'll ask him when is his birthday and he'll tell me. I say, "Well, I'll come and get you for your birthday if you don't quit." And I do.

* * *

[59] Q. Well, if you were going to have somebody's bond lowered, would you consider that to be a service that whoever's in jail would really appreciate?

A. I would like to think so, yes, sir. It'd change their -- change their ways, I mean, with narcotics.

Q. Wouldn't it be your practice to go down and talk with them, to interview them and say, I might be able to get you out of here, but I'm going to need some help once you get out?

A. Yes, sir. I've done it many times.

Q. Then if you had done that with Joe Budwine, you had interviewed him and said, I can get you out of here, reduce the bond, wouldn't you have expected him to have remembered that so he understood who was going to get him out?

A. Yes, sir. I -- I would like for him to because other than that he probably would still be in jail -- still be incarcerated on a $240,000 bond that his family don't have.

Q. But you don't know if you went down and did that or not?

A. No, sir. I'm not sure.

[60] Q. It's just possible?

A. It's possible. I don't think I'd have done it for Joe. I be honest. He was cutting up too bad.

Q. If you had been directed by the Chief of Police, Billy Ray Vice, I want you to go down and see what you can do about getting the bond reduced on any particular person, would you do that?

A. I have done it before. And told Wayne Frey to his face that I wasn't comfortable with it. But he's my boss. I do what he asks long as it's legal.

* * *

[64] A. After I was working I-10 and my cell phone rang, and it was Joe Dewaynus saying he needed to talk to me. So, I asked Joe what about. He said, "Well, when you get a chance we'll talk in person." "No, tell me what's going on." He wanted to know if we could meet, we met. That's when I told Joe, I said, "So that's what this is all about." I said, because for some reason -- I don't know why I did it, but I did -- I made a copy of that statement of Budwine and hid it in my office. Why I did it, I didn't know at the time, but I just had that feeling something wasn't right. So, I saved a copy of it.

Q. When you say you copied the statement of Joe Budwine, you talking about that handwritten statement that he wrote out and signed?

A. That's correct.

Q. Did you make a copy of that statement after you had had the conversation with Troy Cary?

A. Yes, sir, I did.

Q. So, you had some -- after you had the conversation with Troy Cary, you had developed some suspicions about what was going on at that time, correct?

[65] A. That's very correct. Because the things he was saying about Chief Fox. So, it was more -- excuse me -- like he was saying, I don't care about that mother fucker, I hope that mother fucker don't win, you know, stuff like that. So, I mean, you catch somebody talking that bad about somebody you don't even know this person, there's a problem somewhere.

* * *

Q. But when Troy Cary told you about these statements you thought there was something illegal going on that motivated you to go photocopy Joe Budwine's statement. Right?

[66] A. Correct.

* * *

A. I felt that Troy Cary is the one who was behind everything leading Joe Budwine up to say this. That's just my personal opinion. Because Joe Budwine has been around Chief for -- I can't tell you how long. He know Chief daughter, the whole nine yards. He's never had an altercation with the Chief.

* * *

[70] Q. Before Joe Dewaynus talked to you, you had photocopied Joe Budwine's statement because you thought there was criminal activity going on? Yes or no?

A. Yes.

* * *

[72] Q. you told us that you thought Troy Cary, you know, he could make things up, didn't like Ricky Fox. Can you think of any other reasons why he might have been behind a campaign to discredit Ricky Fox or see him defeated as Chief of Police?

A. My personal opinion is the fact that the Chief being ex-trooper, of course, if he won -- which he did win -- that he was going to get into the police department and change things. Which I was hoping that would happen far as making the officers dress appropriate, make sure their shoes and stuff is clean, the uniforms is pressed. Make sure they're well-shaved to represent the Town of Vinton, but also the state of Louisiana. Look presentable. My personal opinion with Troy was the fact that he wanted a Chief in there that he can control. He didn't want someone in there that he couldn't control. And I knew it. And I know he knew that he wasn't going to control Chief Fox if Chief Fox won. I think he was afraid the [73] department was going to be ran like a police department's going to be ran professional.

Q. All right. Did Troy Cary ever tell you that he felt like that he had better chance of controlling the Chief of Police if it was Billy Ray Vice rather than Ricky Fox?

A. No, sir. Only thing -- excuse me -- but only thing Troy said, "If that sorry mother fucker win, I'm quitting." That's what he said. I mean, --but the way he talked, it seemed to me as control because I

basically recall that he was kissing Chief Vice butt because he was always -- I mean, every time you turn, if you stop too soon, he'd went down.

Q. And when you say that Troy Cary was behind something, are you talking about the basketball game incident, the letter or both?

A. I felt both.

Q. How about Billy Ray Vice, why is it that you thought he might have been behind this?

A. My personal opinion I just felt that this election was something that Chief Vice had wanted for a long time, that he really wanted to be Chief of Police. I don't fault the man for wanting to be the Chief of Police, I mean, if that's the dream [74] that he had, you know, I'd like to see everybody dream come true. But you go to that extreme to do something to try to discredit someone, it's a different story. So, I felt, yes, that he was behind the letter. Did I know for sure? No, I did not know for sure. But I felt that he was behind it to discredit him. To try to make him back off from running for Chief, where he can be a walk-in.

* * *

[81] Q. Did Billy Ray Vice tell you, I have instructed my officers to ticket those supporters of Ricky Fox that are identified?

A. Just anybody that supported -- that we know that's supporting Ricky.

Q. That's what Billy Ray Vice told you?

A. Me, him and Troy was in there discussing the conversation about different things. And that [82] conversation was brought up.

Q. Is that conversation that you had with Billy Ray Vice one of those during which you were wearing a wire?

A. No, sir, not at that time.

Q. So, that statement by Vice is not going to be one that would be included in the recordings then?

A. No, sir.

Q. I want to make sure I understand. Billy Ray Vice told you that he had instructed certain officers to write tickets, traffic violations citing supporters of Chief Fox?

A. That's correct.

Q. What else did Mr. Vice tell you about a campaign to intimidate Chief Fox's supporters or to otherwise keep him out of the election?

A. Well, going back to the Budwine deal, after I heard Joe saying his deal that he was in Chief office when he wrote his statement, no, he wasn't in the Chief's office. He also said that he think it was Troy the one who went and picked him up from his house. I'm the one who went to his house. I wasn't in a marked unit. He wasn't home. I left a message with his sisters. Later he returned my call and I went to

Chief Vice and [83] told him that Joe wanted me to go get him. Chief instructed me to go get him. I went back to my office before I left. I called the FBI office and instructed them that Billy wanted me to go get him, that I wasn't comfortable. Joe told me to go ahead and get him, just try to hang around and listen much as I can, if I can make a copy of whatever. So, I went got Joe, brought him back to the office and hung in the office for a little bit, but Troy is the one who actually instructed Joe what to write in his statement. Because Joe -- I mean, Joe wasn't in the office but a little time with – with Chief Vice. Chief Vice didn't tell him how to write his statement. It was Troy the one who was the one telling him what to write and how to write it.

Q. Did Troy dictate the statement to Joe, and say Joe write this down?

A. Told him what to write.

* * *

[84] Q. Okay. But you're the one that picked up Joe Budwine?

A. That's correct.

Q. And you brought him back to the station?

A. Yes, sir.

Q. You picked up Joe Budwine on direction of Billy Ray Vice?

A. That's correct.

Q. Did Billy Ray Vice tell you why he wanted you to go pick up Joe Budwine?

A. No, sir, he didn't. I had -- I had asked him what [85] for, and of course, Billy -- "Goddamn, when I tell you to do something, I just go do it, don't ask no goddamn questions, you know, joking." So, I went and got him. But once I got to the house where Joe was waiting for me, I asked Joe what was going on.

Q. What did Joe say?

A. Joe told me that Billy had wanted him to come up there and write a statement against Ricky Fox.

Q. Joe told you that Billy wanted him to come up there?

A. Right.

Q. Did Joe indicate to you that he and Billy had discussed this previously?

A. Yes. Because he said that my understanding that Joe had made a threat against Ben and --

Q. Chief --

A. Yeah, his family. And of course, he made a threat against him, but I told Joe I can't tell him what to do, how to do it, or when to do it.

* * *

Q. When you went to get Joe Budwine, was it your [86] understanding that you were placing him under arrest?

A. No. Because honestly with Joe, you can ask anybody, Joe don't never call me. Because Joe know if I'm looking for him, he's going to jail for something.

Q. Okay.

A. So, apparently he had already talked with the Chief before he made contact with me. So, that's why he wasn't nervous, wasn't scared. And I went in an unmarked car. I was driving an Impala back then. And that's what I went picked him up in.

Q. And when he came out, he already knew why you were there or you had to tell him?

A. Joe knew why I was there.

* * *

Q. Joe sit up in the front with you?

A. Yeah. I put him --- yes, sir, because it's --

Q. You didn't frisk him?

A. No.

Q. You carried him to the station. Did Troy Cary and Billy Ray Vice take over from there, or was it mostly Troy Cary or --

[87] A. I brought him into the Chief office, and of course, Chief told Joe to sit down, have a seat, and, you know, and asked him questions on what happened in this incident and wanted to know would he be willing to put it in writing. And Joe said yeah, and Chief and Joe -- Troy both stated, "Well, we got to do whatever we can to keep this son of a bitch out of office."

Q. That's Billy Vice and --

A. Troy.

Q. -- Troy Cary, we got to do whatever we can to keep him out of office?

A. Exactly. Well, at that time I think Chief, at that time, had somebody else coming in his office, and he say -- he told me and Troy to go ahead and handle it.

Q. You say Chief, you're talking about Billy Ray Vice?

A. Billy Vice. I'm sorry. Yeah. Told us to go ahead and handle it because he had somebody else coming in. So, I walked out with Troy Cary and Joe, walked in the office. And once he -- see, Joe didn't tell this neither -- once he started writing his statement, Troy looked over and saw what he was writing, and he's like, "No, this [88] ain't -- ain't going to cut it." So, he took it, which I tried to get it, and tore it up. I tried to get it.

Q. You tried to get the original statement?

A. That he tore up. But what he did with it, I don't know.

Q. Who tore it up?

A. Troy did. So, I left out. I came back in. He was telling him what to write. And honestly, I just shook my head and said, boy, you fucking up, to myself.

Q. You told Joe that?

A. I told --

Q. Joe Budwine right there or Troy Cary?

A. No, I said it to myself. Honestly, as I was walking back to my office, I was thinking how cruel can people be to one another in order to get a position that don't pay shit, you know.

* * *

[89] Q. Do you know what the purpose of Billy Ray Vice directing certain police officers to write tickets to Chief Fox's supporters was?

A. My personal opinion, where they can try to come in and get some assistance. Like you help me, I help you.

Q. Do you know of any instances where that happened, [90] where a supporter was ticketed, they brought the ticket in to Chief Vice, and Chief Vice says, I'll take care of this for you?

A. Several times.

Q. Can you give me any specific individual who was ticketed, who was a supporter of Ricky Fox, who brought the ticket in to Billy Ray Vice, and then Billy Ray Vice took care of it?

A. Only thing I can tell you, I have to go back on the court records and see what was kicked out and what wasn't. I mean, I don't know -- couldn't tell you names, but there were several tickets taken care of.

Q. If you wanted to do that, what would you have to do in order to come up with those names, those instances?

A. Contact Ms. Debbie McBride at the city hall.

Q. And when you say that Billy Ray Vice would take care of these tickets, he would just dismiss them himself?

A. Well, he can't dismiss them. He can do a recommendation to the judge.

Q. Is that what you mean by he'd take care of them, he'd make a recommendation to the judge?

A. Right.

[91] Q. And who was the judge out there?

A. Alvin King.

Q. Did Alvin King always follow Chief Vice's recommendations?

A. Well, not just Chief Vice. I mean, he'd try to work with all Chiefs. I mean, he would even try to work with the officers to a certain extent. I mean, he'd try to do what the officers feel is best and what he feel is best, you know.

Q. If the Chief -- if Chief Vice did make a recommendation that a ticket be dismissed, what were the odds that Alvin King, the judge, would go along with that recommendation?

A. It's usually dismissed.

Q. Would you say nine times out of ten or 19 times out of 20, 99 times out of a 100? You know, what were the odds?

A. I'd say out 100 out of 100.

Q. 100 out of a 100. Recommendation's a pretty sure thing?

A. Yeah.

* * *

[94] Q. When you say it was things that he was trying to get in the paper, who's he?

A. Chief Vice.

Q. Your initial responses when asked about whether or not this ought to be taken -- this letter -- this extortion letter be taken to the Press for publication, your initial response was no. How [95]

did Billy Ray Vice respond, how did he react to your answer?

A. He had questions. He was like, "Well, hell, why not." You know, I mean, "that son of a bitch," he said -- of course, you know, he would tell me, "You know, that son of a bitch, he don't like niggers. You know, if he get in there, you know, you going to be screwed," and different things like that, you know. Did I think that? No, I didn't think that. The only thing I was trying to do what was right -- what I felt was right.

Q. Did you try to backtrack on your answer and encourage him to, you know, step off the deep end again?

A. No, sir, I didn't and I tell you the reason why is because at the time Chief Vice was very paranoid. I mean, he can be looking at me for a second, but he's constantly turning around looking different places.

* * *

Q. [96] Okay. At any time during this entire investigation did Chief Vice ever read this letter out loud?

A. No, sir.

Q. How did that conversation end up at the back of the police station when he showed you this letter?

A. Told me don't -- he told me like this, he said, "You son of a bitch, if this fucking letter get out," he

said, "I'm going to know you said something," he said, "because it's only two people know about this."

* * *

[101] Q. (Mr. Hart) What knowledge do you have of Chief Vice's attempts to get the basketball incident publicized in the Lake Charles American Press or any place else?

A. It was brought -- they had, like I said, two reporters in there. One was Eric Cormier.

Q. How did Eric Cormier come to Vinton? Do you know how he got there?

A. Yes. As what I was telling you earlier, at some of these parts I might get them mixed up. It's nothing done intentionally. But I do remember this specific part. Chief Vice asked me to contact the newspaper. Quote, unquote, he wanted me to talk to Eric because Eric was black and I was black, to try to get something published in the paper.

[102] Q. Eric Cormier?

A. Yes, sir. So, what I did, I called Joe Dewaynus and told Joe. Well, at first, I made several attempts to contact Joe. If I'm not mistaken, Joe was in trial in Lafayette. It was unsuccessful. So, I blew it off with the Chief. You know, he asked me did I make contact. I told him -- I lied to him. You know, I lied to him and told him that I had left a message on Eric answering service machine to contact me. Once -- a couple of days went by, the Chief confronted me again about it, and I told him I don't know why Eric

hadn't called me back. Then finally Joe called me. Joe said, "Well, if that's what he want to do, let him do it." So, then I contacted Eric and Eric and another gentleman showed up.

Q. From the newspaper?

A. From the newspaper. They were already there in the Chief office and the Chief called me and asked me to join the meeting.

Q. Billy Ray Vice was talking to the reporters?

A. And Troy Cary.

Q. And was Billy Ray Vice trying to get the reporter to publish this incident?

A. Well, publish -- not just this incident, but other [103] things that he felt that he could do basically in attempt to discredit the Chief. Of course, one time in there, I -- and I told Joe what I did, and I kind of stuck my foot in my mouth because some of the things they wanted to put in the paper and I'm like, "Oh, I wouldn't put that, you know." Because I was going on my instincts or hunches that Eric would say the same thing, and which he did, you know, we can't put this certain thing, but we can put that. But we can't put this, but we can put that. So, I fell right there with him. And the reason why I beat Eric to the answer of, no, I wouldn't do that, to make my trust even greater with Chief Vice. Because now I can go back when he felt uncomfortable about something, I could make him -- as a reminder, well, you remember what I told you not to put this in the

paper, and Eric also agree with -- oh, yeah. Because [103] he like listen to things like that. So, that's the only reason. But I did contact Joe right away, and advised Joe what was going on with them attempting to write a nasty article on Chief Fox.

Q. Was Troy Cary involved in that effort to get that published as well?

[104] A. Oh, yes, sir.

Q. Do you know if Troy Cary was acting on

instructions from Billy Ray Vice?

A. Me, personally, I think Troy was just acting on himself. This was a little bit more spunk from the Chief. But again, he had animosity, I felt it was hatred toward Chief Fox. Why, I don't know.

Q. Well, when the reporters were in the Chief's office - Chief Vice's office and they were discussing what -- trying to get something published, was Troy Cary in there as well?

A. Oh, yes, sir.

Q. Troy Cary was acting with the Chief discussing publication of these defamatory articles with the reporter from the Lake Charles American Press?

A. That's correct.

Q. You had told us earlier that when Joe Budwine came in to do a statement you were in there?

A. Yes, sir.

Q. Troy Cary was in there?

A. And Chief.

Q. And the Chief?

A. That's correct.

Q. Joe Budwine started writing the statement out?

A. Yes, sir.

[105] Q. Was he saying -- was he reading his statement out loud as he wrote, or was somebody reading it or what?

A. Well, he was writing it out and Troy was standing over his shoulder watching what he was writing.

Q. Did you read it?

A. I was -- no, sir, not at that time.

Q. Do you know what he was writing?

A. Not at that time. Not at that particular time. Until later when we walked to the other side of the office I looked over and --

Q. The first statement?

A. Yes, sir. The one they tore up.

Q. The one they tore up?

A. Right.

Q. What did that statement say?

MR. VICE:

He's mixed up in which office he was in.

A. We wasn't in the Chief office then. We was in the back office. I know Joe was saying that he -- he really was disappointed in the Chief, and -- because [105] what he said. But Troy was more instigating to him, yeah, because he's a racist, you know, he don't like black people. He don't like niggers. To try to make Joe, and Joe -- you [106] can tell when you talk to him, you know if he sell dope, he's going to be very easily to be influenced by others. So, whenever Troy was telling him, he was putting down because Troy was telling him exactly what to write.

* * *

[114] I said I felt something wasn't right with the statement.

Q. Why was it different than when Mr. Walters said it?

A. Because it was coming from Troy Cary and Joe Budwine. That's why. I mean, Joe's a known

drug dealer. I know he don't like Ricky. Troy didn't like Ricky. So, I mean, first thing come to my mind. I'm thinking this is a plot.

* * *

[116] A. The reason why -- it wasn't because of the racial things that was said in the statement. The fact that when you give somebody a legal document that [117] belongs to the police department, and you ask them to write out something in their own words, but you're going to tell them how to articulate this writing, and then you take another paper that they had in your possession and tear it up, yes, there's a problem.

* * *

[119] if you go back to the history of Joe handwriting and stuff that he had in school, compare the difference, you'll see that wasn't Joe that was writing that. That was somebody telling him what to do.

Q. Were you in there the entire time that this statement was being written?

A. No, sir. Because once he started telling Joe what to write, I stayed there for a couple of minutes, and then Joe even asked Troy how to spell a couple words, and Joe even asked him, "So, what you want me to put after this." "And well, read to me what you got so far."

Q. All right.

A. I left out.

Q. Was this when he was writing things the second time or after the first statement that was torn up?

A. It was the second time when he was writing. After the first statement was torn up.

* * *

[127] A. Troy is the one who brought it up. Troy -- we was in there talking and joking, and Troy brought the conversation up about writing everybody supporting Chief Fox tickets. Chief Vice like, "I wouldn't go that far with it. I wouldn't -- I don't think you should do that." Troy was like,"Yeah, I write everybody tickets." Chief told him, "If you start doing that, I don't want to know nothing about it." That was the end of that.

* * *

[145] Only thing Troy told me that Chief Vice wanted Joe to push the issue about the racial slurs supposedly the Chief had said to make him look bad so the blacks won't vote for him.

Q. But neither Troy nor Mr. Vice have told you that they offered to get Joe Budwine's charges dropped in return for pushing that issue?

A. Only thing Troy said that the Chief is going to [146] try to help him out to get the charges dropped. That's what Troy said. I never heard that come out the Chief's mouth.

Q. Now, did Troy put those two together. That's my question. Troy did put those two together, for pushing the issue, Chief Vice was going to try and drop the charges?

A. Troy said that the Chief was going to help him out to get the charges taken care of, you know. Did I hear Chief Vice say that? No, I didn't.

Q. Okay.

A. Troy, yes.

Q. Now, you testified also that you think Troy Cary set up the incident at the basketball game between Joe Budwine and Mr. Fox or was involved in instigating it?

A. I think Troy was involved in instigating it. But I think they both had something -- knowledge of it.

Q. When you say had knowledge of it, but they weren't involved in instigating it, can you explain the difference?

A. I thought -- me, personally, thought it was a setup from the go, from the time it happened. Who was behind it? Yeah, I thought Troy Cary and also [147] Chief Vice was behind it.

Q. Behind it in terms of --

A. As in --

Q. For the --

A. As in before it actually took place and after it took place. Because even after everything happened, Troy Cary's not the officer that goes to basketball games or football games. He's not. And as a police officer sworn to protect the Town of Vinton, when this altercation took place, from my understanding, Troy Cary never stepped up as a police officer to dissolve the matter. He continued to let it happen and walked away. Why would you walk away on a situation like this. If it was anybody else, you'd have took control of the situation. At that time he did not.

Q. Now, Troy Cary told you that he was at the basketball game?

A. Troy told me he was there.

* * *

[160] Q. Lieutenant Phillips, what documents were shown to the newspaper reporter?

A. The allegation against Chief Fox on the racial slurs at the game.

Q. Was the letter shown to him?

A. I want to say I thought the letter was present, and I'm not sure right now. I don't want to lie. [161] But there were other things that was there to try to get put in the paper, but it never got off the -- off the ground.

Q. What other things were there besides the basketball complaint by Bud -- you know, the

complaint by Budwine, and possibly this extortion letter?

A. I don't remember.

Q. But there were other things that were there?

A. Yes, sir. Other conversation.

Q. Were there other things that were less than flattering for Chief Vice, is that what they were?

A. Yeah. Chief Fox, you mean. You mean Chief Fox?

Q. I'm sorry. Chief Fox.

A. Yes. Yes, sir.

Q. You just don't recall what they were?

A. I just don't recall everything. I'd have to really think about it.

Q. Who supplied them?

A. Troy had several things and ran his mouth in there and also Chief Vice.

IN THE FOURTEENTH JUDICIAL DISTRICT COURT

IN AND FOR THE PARISH OF CALCASIEU

STATE OF LOUISIANA

STATE OF LOUISIANA
VS. NO. 19611-05
BILLY RAY VICE

[Extract of Proceedings]

[Testimony of Agent Joe Duenas and Trooper Kent Peveto]

EVIDENCE ADDUCED AND PROCEEDINGS HAD in Open Court at Lake Charles, Louisiana, **April 11, 2007**, before the Honorable Rick Bryant, Judge of the Fourteenth Judicial District Court, in and for the Parish of Calcasieu, State of Louisiana.

* * *

[3] MR. WILSON:

The state calls special Agent Joe Duenas.

AGENT JOE DUENAS

after having first been duly sworn, was examined and testified as follows:

* * *

[5]
A Yes, it did.

Q All right. If I can see that back.

A (Witness tenders document to counsel.)

Q Now, you stated a second ago that you had received the original copy of the letter and the envelope that it came in, I believe?

A Yes.

Q Okay. Was that submitted for any type of analysis?

A. Yes, it was.

Q. Okay. What type?

A We sent it to the lab for fingerprint analysis.

Q What were the results of that?

A There were no useable prints on the envelope or on the letter itself.

Q So there were no useable prints found either one of those pieces of paper?

A That's correct.

Q In your experience, does that lead you to believe that the person who sent that letter was attempting to conceal their fingerprints?

A That's certainly a possibility, yes.

Q Now along those lines, after you had opened up your investigative file, did you have the occasion to contact anyone that you knew in the Vinton Police Department regarding this matter?

A Yes I did.

Q Who was that?

A That was Arthur Phillips. I believe he was a lieutenant at the time.

Q Did you know Lieutenant Phillips prior to this

* * *

[11] Q. Now, on the date of the interview -- and I direct your attention -- I believe that occurred on April the 5th of 2005. Does that sound about right?

A. Yes.

Q. Okay. If you could just describe to us what took place during that interview, the substance of it, what was said and so on and so forth.

A. during the interview there were, of course, lots of questions asked about what Mr. Vice's knowledge was regarding that letter, whether or not he knew where the information came, who had written it, who had sent it to Mr. Fox, questions such as that. And it -- do you want me to go into his responses or --

Q. Absolutely.

A. Okay. And at various times during the interview Mr. Vice admitted that he had written the letter. Later on in the interview, he -- he changed his story to say he had not. He indicated that he had sent the letter, and then he retracted that as well. And at various times he indicated that he was more or less trying to cover up for someone.

And actually I think we actually

[12] asked him that question, and he refused to answer on one occasion, I think. And there were -- there were other occasions where we tried to remind him that as a sworn law enforcement officer, it was his duty to uphold the law. And at some point he indicated that he wasn't concerned about that oath and thereafter maintained that he had not written the letter, didn't know who had sent it, but yet still indicated that he was trying to cover up for someone.

Q. I see.

A. He didn't say that, but that was certainly the impression he was giving us.

Q. Now, it's a crime to lie to the FBI, isn't it?

A. Yes, it is.

Q. I'm sure at some point in the interview, is it your testimony that you reminded Mr. Vice that he had a duty placed upon him to tell you the truth?

A. On several occasions, I believe.

Q. On several occasions. And I believe you just testified that he didn't his oath really meant anything at the time?

A. That's correct.

Q. Okay. Would it be fair to say that the interview amounted to a lot of conflicting statements on the part of Mr. Vice?

A. Yes.

Q. Did that cause you to continue with your investigation, based upon the substance of that interview?

A. Yes, it did.

* * *

MR. WILSON: [15] arrested for extortion?

MR. THIBODEAUX:

Your Honor, I object to the question.

THE COURT:

That's sustained. That's a question for the jury.

MR. WILSON:

Okay. I have no further questions, Judge.

THE COURT:

All right.

MR. WILSON:

I'm sorry. I actually have one more question, if the Court would allow it.

THE COURT:

Go ahead.

BY MR. WILSON:

Q And I apologize, Agent. I wanted to ask you: Were you able to verify, subsequent to your interview with Captain Delcambre, were you able to verify that Captain Delcambre had actually faxed the information that he referred to to Mr. Vice?

A What we were able to confirm is what Captain Delcambre had told us, that he had faxed the information that was indicated in the check marke letter to Mr. Vice, some point between January and say, February of 2005. And how I did that is I had a grand jury subpoena issued to the telephone company that services the Vermilion Parish Sheriff's Office, I believe, asked specifically for the telephone

[16]

records for the fax machine. In fact, the telephone records' showed a single call, if you will, from the fax machine January 14th, 2005, to a telephone number that is listed as a business in Vinton that is owned by Mr. Vice and his wife.

Q Is this the auto parts store?

A Yes.

Q I'm going to show you what I've marked as State's Exhibit S-5. Ask if you could identify this.

A This appears to be a copy of the telephone records that I received from the telephone company in response to the grand jury subpoena.

Q And if I could direct your attention to a specific entry, just refer to a phone call on January 14th. Would that be the one at the very bottom of the page?

A It would be.

Q And was that, to your knowledge and your investigation, that was a call or a fax placed from Ken Delcambre's fax machine to the auto parts stc owned by Billy Vice?

A That's correct.

Q All right. And what was the date of that?

A That was on January 14th, 2005.

Q January 14th. And to your knowledge, did Mr. Fox receive the letter sometime around the 21st of January?

A I believe he received it on January 21st.

Q January 21st.

MR. WILSON:

* * *

[27] A his answer to indicate that he couldn't recall if he had -- I'm sorry. I'm reading from the wrong paragraph.

Q Okay. And then at some point in time, he stated that he had written the letter, didn't he?

A He stated that three times.

Q Now, when he stated that, did he not preface his remarks like, "If you say I did it, I did it. I wrote the letter"? Did he say it in that – in that manner?

A Yes, he did.

Q And, now, somewhere in this questioning, did you not tell Mr. Vice something to the effect, "I know you didn't write the letter"?

A I may have said that, yes.

Q Now, is that because you knew he didn't write the letter, or is that just some kind of questioning technique?

A That might have been a technique.

Q Did you have any reason to believe that you knew he didn't write the letter? That's -- that's a bad question. Okay. Did you -- did you have any information leading you to believe that he did not write the letter at that point in time?

A I'm not sure.

Q But you did say something like that? It might have been a questioning technique; it might have been based --

A Yes.

Q -- on information you thought you knew?

A Yes.

Q Now, you directly asked Mr. Vice if he was

[28]

covering up for somebody?

A I don't remember if I asked him that directly but that was -- that was the text of there 4 questioning, yes. And he refused to answer the question, I believe.

Q I'll refer you to the last paragraph on your 302 Form. It's at page 2.

A Right. He declined to answer the question.

Q Now, present in that interview was also the state trooper, correct?

A Yes.

Q Kent Peveto. Do you recall, during the hours of the interview (pause) -- and Chief Vice, after he read the letter, did he state that -- after he read the letter, did he state that "This should be put in the paper last week"? Do you recall him stating something to that effect?

A I don't recall him saying that during the interview, no.

Q Now, that sounds to be, like, something that you probably would have put -- if he said something like that, you probably would have put that in your notes?

A Not necessarily. You have to understand, these are handwritten notes taken contemporaneous with the interview. We're not going to get down every word. That's not the purpose.

Q Okay. During the course of that interview, did Chief Vice ever say that he wrote the letter and then he mailed it to Ricky Fox in an attempt keep him from running for the office of chief of police?

[29]

A To keep him from running?

Q In an attempt to keep him from running for chief of police?

A He may have said that, yes.

Q Now, what type of investigation were you doing? What offense were you looking at?

A Extortion.

Q Now, if he'd have said something like that, wouldn't you have put that in your notes?

A Sure. But Mr. Vice said a lot of things. A lot of this and a lot of that. And he kept going back and forth with his answers. And his attitude was that, "Sure, I'll tell you whatever you want to tell you," even though we stressed to him that what we were looking for was the truth and we expected to hear the truth from him -- especially considering the fact that we had tape recordings of him saying something quite the opposite, as it was hard to follow during the interview, quite frankly

Q Okay. I understand. Now, but, in fact, you apparently did not put any information -- did not put it down in your notes that he sent the letter, he mailed the letter in an attempt to keep Ricky Vice from running for office; is that correct?

A That's not in my 302, and most likely it's not in my notes.

Q Now, just to clarify one thing. Now, this is referring to Captain Delcambre. Okay. After conducting an investigation, you checked the – the fax records of, what parish, Vermilion?

A Yes.

Q -- Vermilion Parish and did document that –

[30]

well, find that a fax had been sent to Billy Vice's home; is that -- to his fax machine; is that right?

A Not to his home. To his business.

Q To his business. Excuse me. I'm sorry. But not to the police station?

A. No.

Q Okay. And I assume that y'all checked for other faxes to see if there had been any other faxes sent to any and all numbers that Mr. Vice might have had; is that correct?

A No, it's not correct.

Q Not correct?

A No.

Q Okay. Well, let me ask you this: In terms of checking phone records, what were you looking for?

A We checked phone records on Mr. Vice's cell phone, on telephone records at the -- the Vinton Police Department for outgoing calls to Captain Delcambre, and we found no evidence of any of that

Q The election was on April 5th -- excuse me -- April 2nd of 2005; is that correct?

A I don't know if it was or not. I know it was –

Q The inter...

A -- after --

Q The interview was April 5th of 2005?

A That's correct. Right.

Q And so you initially contacted Mr. Vice late in the month of March, and he asked you to put this off until shortly after the election; is that correct?

A That's correct.

[31]

Q So if I tell you April 2nd was the election date, do you have any argument with that?

A No, I don't.

Q Okay. Now, of course, you were investigating this particular case, had been since -- for several weeks. Did you ever see any publicity given to the fact that a letter had been sent with disparaging remarks to Ricky Fox?

A No, I did not.

Q So you didn't see anything in the newspaper, anything like that, that Ricky Fox had received something like that?

A I did not.

MR. THIBODEAUX:

I'd like to mark as D-2 this document, Your Honor, and ask Special Agent Duenas to look at this.

THE COURT:

All right.

BY MR. THIBODEAUX:

Q And what does that appear to be?

A This appears to be some sort of campaign ad paid for by the Ricky Fox Campaign Fund wherein he asserts his willingness to continue his candidacy, to disregard the voices of -- or the actions of a few.

Q Now, is there a reference to threatening letters in this campaign ad?

A Yes, there is.

Q Okay. Now, had you ever -- during the course of your investigation, you might not have read every ad in the paper; I realize that. But did you * * *

[37] State calls Trooper Kent Peveto.

TROOPER KENT PEVETO,

After having first been duly sworn, was examined and testified as follows:

* * *

Q. [39] He was wearing a wire?

A. Correct.

Q. During the investigation, were there occasions when Officer Phillips turned over the tape recordings, recorded conversations to Agent Duenas?

A. Yes.

Q. Now at some point in your investigation, did either you or Agent Duendas arrange an interview with the defendant, Billy Vice?

A. Yes, we did.

* * *

[40] Q. Do you recall the substance of the interview of Mr. Vice? How did that play out?

A. Could you be more specific?

Q. Well, when you were talking to him, did you show him the letter?

A. Yes.

Q. And I want to show you here State's Exhibit S-1 just so you can identify this for the record. Does this look familiar?

A. Yes, sir. That is a copy of the letter that was sent to Ricky Fox.

Q. And did you show this letter -- either you or Agent Duenas to the defendant?

[41] A. Yes.

Q. Okay. And what did you ask him about it?

A. I asked him if he had any knowledge concerning the letter.

Q. And what did he have to say?

A. He read the letter. He initially denied any knowledge of who wrote the letter or how it was -- or who mailed the letter, and he basically said that it should have been published the week before.

Q. Okay. When you continued with the interview, did he ever change what he was saying to you about the authorship of that letter?

A. Yes. He changed his version to say that it was mailed to his residence anonymously, and then he later changed his version saying approximately -- it was three different times he stated during the interview that he, in fact did write the letter himself.

Q. Okay. Toward the end of the interview, did he stick with that line, or did he then recant at some point?

A. At -- well, at the end of the interview, the last thing that he had mentioned was he knew who had written the letter or who provided the information, but he wasn't going to reveal the person's identity.

IN THE FOURTEENTH JUDICIAL DISTRICT COURT

IN AND FOR THE PARISH OF CALCASIEU

STATE OF LOUISIANA

STATE OF LOUISIANA
VS. NO. 19611-05
BILLY RAY VICE

[Extract of Proceedings]

[Testimony of Captain Kenneth Delcambre]

EVIDENCE ADDUCED AND PROCEEDINGS HAD in Open Court at Lake Charles, Louisiana, **April 12, 2007**, before the Honorable Rick Bryant, Judge of the Fourteenth Judicial District Court, in and for the Parish of Calcasieu, State of Louisiana.

[1]

* * *

* * * * * * * * * * * * * *

* * *

State calls Captain Kenneth Delcambre.

CAPTAIN KENNETH DELCAMBRE,

after having first been duly sworn, was examined and testified as follows:

* * *

[3] A I'm Captain Kenneth Delcambre. I'm the - - I'm retired with State Police.

* * *

[4]

BY MR. CALDWELL:

Q So you're a captain of the Vermilion Parish Sheriff's Department. How long have you been a captain with them?

A July 1 of 2004.

Q And prior to that were you also in law enforcement?

A Yes, sir.

Q And what position did you hold?

A State Police. I was a troop commander for 30 years. Oh, not 30 years. I was State Police 30 years. Troop commander for almost seven years.

Q Okay. And what do you currently do at the Vermilion Parish Sheriff's Office?

A I run a interagency task force that consists of the cities and the sheriff's office and also DEA Task Force that we have some -- some people assigned to, and I also coordinate some of the

Louisiana Sheriff's Association Drug Task Force personnel.

Q Do you know a fella by the name of Ricky Fox?

A Yes, sir.

Q How do you know Mr. Fox?

A He worked for me when I was troop commander at Troop D.

Q He worked for you?

A Yes.

Q And how long did he -- how far back do y'all go?

A I was promoted March '91, and I retired October 10th of '96.

Q Okay. Would it be fair to say that y'all

[5]

probably aren't the best of friends?

A Right.

Q Y'all don't like each other; is that – is that fair to say?

A Correct.

Q Do you know -- do you know Billy Vice?

A No, sir.

Q Have you ever met a fella by the name of Billy Vice before?

A No, sir.

Q I'm going to take you back to 2004. And were you -- now, back in 2004, the end of 2004, December -- you know, January 2005, let's see, -- I'm trying to get my dates straight -- were you working at the Vermilion Parish Sheriff's Office back then?

A Yes, sir, I was.

Q Okay. And at that time were you aware of a sheriff's race -- not a sheriff's race, I'm sorry -- of a police chief's race over in Vinton? Did you have any involvement in any of that?

A No, sir.

Q At any time while you were employed, did you ever receive a phone call from a fella by the name of Billy Vice?

A Yes, sir.

Q Okay. And what was the nature of that communication?

A He wanted to know from me if I had any information about any of Ricky Fox's wrongdoing. He had heard from other troopers that Ricky Fox had been involved in a lot of problems when -- when I

[6]

was troop commander with State Police.

Q Okay. And what was your response? I mean, you know, did you agree to provide any of that information initially?

A If I recall, when I first received the message, we talked briefly about -- about Ricky. And then a few days later, he kept calling. I was extremely busy; I can remember that. We had just taken office in July, and we were -- we were extremely busy. And he kept calling back, leaving messages, and then finally I returned his call. And I said, "Look, I can give you some -- some instances. I don't know the dates, I don't know the times, I don't know anything, because that -- that's all in his personnel file, and I don't have access to it, but I Can tell you some of the incidents that he was involved in."

Q All right. Did you ever meet with Mr. Vice in person?

A No, sir.

Q Have you ever seen Mr. Vice before --

A No, sir.

Q -- today? Would you know what he looks like?

A No, sir.

Q All right. When you told Mr. Vice, "Well, look, I'll get -- you know, I know some instances of whatever," did you, in fact, communicate that in some fashion to Mr. Vice?

A If I recall, back and forth with phone calls, calling me and then he'd leave messages and when I could, I'd call him back. I told him, I said, "Look, I'm going to write certain things on a – on

[7]

a paper, and I'll fax you the information." And then I said, "Again, I don't have dates, I don't have times, you know, that's all in his personnel file, and I don't have access to that."

Q Did you type anything? Send anything to him typewritten?

A I don't think so, sir, no.

Q Okay.

A Not that I recall.

Q I'm going to show you

MR. CALDWELL:

Do y'all have S-4 up here? Okay. Thank you.

BY MR. CALDWELL:

Q I'm going to show you what I have marked as S-4. Do you recognize that?

A No, sir.

Q Let me ask you this: Were you -- let me -- let me back up a little bit. Do you recall about when you would have given this information to him, when you would have faxed it to him?

A The only -- the only recollection I would have is when you spoke to me outside and gave me a date. That's about the only time --

Q Right.

A -- I would have recalled that it happened.

Q Okay.

A And then, like, the phone number you gave me, that's our central dispatch number. Numbers where I work is totally different. Our fax number is different and so is our incoming lines, our calls at the --

* * *

[10] Q Did you ever contact Billy Vice independently?

A No, sir.

Q Okay. Because you didn't know who he was, right?

A No, sir.

Q Had you ever had any dealings with him, law enforcement, or at his auto parts store, or anything like that?

A No, sir.

Q All right. Why did you decide to give him this information?

A He was calling as Police Chief of Vinton, and * * * [11] And as police officers together, it's like exchanging intel; I gave him what I had. And I said, "That's about all I can give you."

DEPOSITION OF
RICKY FOX

United States District Court
Western District of Louisiana
Lake Charles Division

Ricky D. Fox	*	**Civil No. 2:06-CV-135**
	*	
vs.	*	**Judge Minaldi**
	*	
Billy Ray Vice,	*	
Arthur Phillips,	*	**Magistrate Judge**
Troy Cary and the	*	**Wilson**
Town of Vinton	*	

July 2, 2007
11:15 A.M.

* * *

Q. [15] Prior to taking the position of chief of police for the Town of Vinton, who were you employed with?

A. The Louisiana State Police from approximately June of 1980 through my final leave was used up in May of 2005.

Q. Just to confirm, -- I know it's obvious -- the position for chief of police, that was an elected position?

A. That's correct.

* * *

Q. What positions have you held with Louisiana State Police during your long tenure with them?

A. Trooper and sergeant.

Q. Do you receive retirement benefits from the state police?

* * *

Q. [17] Have you ever served in the military?

A. Yes, I have.

Q. What branch?

A. United States Marine Corps.

Q. And how many years did you serve?

A. March of -- March of 1972 through May of 1978.

Q. And what was your position upon entry? What was your rank when you entered?

A. I made meritorious PFC out of boot camp, was promoted to lance corporal upon graduation from the U.S. Army MP school in August of 1972.

Q. And then upon discharge, what was your rank?

A. Staff Sergeant E6.

Q. That discharge, was that an honorable discharge?

A. Yes, it was.

[18]

Q Between 1978 and 1980, when you would have began with the Louisiana State Police, did you have other type of work that you were doing?

A. I was -- from August of '78 through, I guess, probably May of 1980, I was with the Orange, Texas, police department. I was a patrol officer.

Q. I'm assuming -- excuse me -- upon entry of Louisiana State Police, did you go through the academy?

A. Yes, I did.

Q. Have you ever been arrested?

A. Physically arrested, no.

Q. Have you ever been arrested in another manner?

A. Have I ever been cited? Yes, I've been cited.

Q. What were you cited for?

A. A game violation.

Q. A gang?

A. Game violation.

Q. Game?

A. Game.

Q. Around what time period was that?

A. Mid-1990's. I don't recall. It was like '96, '97, '95, somewhere along in there.

Q. Where did that occur?

A. Excuse me?

[19]

Q. Where did that occur?

A. Calcasieu Parish.

Q. What type of game violation?

A. I was cited for -- let me see if I can get the terminology correct. I had aiding and abetting the taking of migratory game over bait, I believe is the correct semantics for it.

Q. What was the ultimate disposition of that citation?

A. The Federal magistrate, which I believe is the current one on the Bench, took a no contest plea.

Q So, you entered no contest. Was there any sentencing involved?

A. I paid a fine and I did, I believe, if I remember correctly, 40 hours of community service at the Sabine National Wildlife Refuge.

Q The citation, was that from the Federal wildlife agent?

A. Yes, it was.

Q. Do you remember who the Federal wildlife --

A. Bill Ferguson.

Q. Let me get my question out. Do you remember who the Federal wildlife agent was that issued the citation?

A. Bill Ferguson.

Q. Any other citations?

* * *

[25] Q. month of January 2005, Billy Ray Vice sent an anonymous letter to petitioner, Ricky Dean Fox, threatening to take certain actions against Fox if Fox ran for the position of chief of police for the Town of Vinton. Billy Ray Vice authored the letter, printed it at the police department and caused it to be mailed to the petitioner." In regard to the allegations in Paragraph 8, do you remember around what time in January of 2005 that you would have received the anonymous letter?

A. No, I do not. Just roughly January of 2005, and immediately the day after receiving the letter, it was forwarded to the local office of the FBI, so, whatever date that was.

MR. MILLER: Also, let me just identify that. I'll identify the petition as "Fox 1."

By Mr. Miller:

Q. Then let me show you this document which identifies "Fox 2," which has been referred to in, I think, previous depositions as the extortion letter. Is that -- I just showed you the document. Is that the letter -- a copy of the letter that you would have received that you're indicating in Paragraph 8 of the petition?

A. That's correct.

* * *

[29]

A. by Mr. Vice in December.

Q. Other than Porterfield telling you about the conversation that occurred during this Christmas parade, did Porterfield provide any additional information to you about this, what I call "Fox 2," this letter coming from Vice?

A. I don't recall specifically, no.

Q. Going back to your initial meeting with the Special Agent Ed Reed, was there any other additional information that you provided to him?

A. Not that I recall, just other than the facts and circumstances of receiving the letter.

Q. Paragraph 8 states that Mr. Vice sent the anonymous letter. It also states that he authored the letter and printed it at the police department and caused it to be mailed to the petitioner.

What information do you have to show that Mr. Vice -- let me ask you -- strike the question.

What information are you aware of that would indicate that Mr. Vice authored the letter? That's "Fox 2."

A. I would ask for clarification in that as to at what point? Are you asking me this question at the point of time that this suit was filed or at this time or --

[30] Q. Let's do it in two respects. Let's do it at the time that the suit was filed first. Then I'll follow up.

A. At the time the suit was filed, it was just -- all those are based on my beliefs.

Q Okay. As far as any actual person, witness, or document, or other type of information at the time that the petition was filed, do you have anything to support your belief that it was Mr. Vice that authored and mailed the letter to you?

A. Other than his -- other than his statement made at the Christmas parade in 2004, and the circumstances that are in that letter, nothing other than that.

Q. What about the allegation of it being printed at the police department? Did you have anything in particular that you knew about in regard to when this allegation was made when the petition was filed?

A. No, sir, I did not.

Q. Now, taking currently where we're at right now at this time, in regard to your belief that Mr. Vice authored the letter, do you have any additional information or are you aware of any additional information to support that finding?

A. I am aware of testimony that the criminal trial [31] that was just held in reference to the Vice matter. I'm aware of some recordings that were made during this ongoing incident back in 2005. So, some specific information that I believe was brought out in the recordings was that there was only two copies of this letter and for someone to state there's only two copies of this letter, that goes a long way in telling me that he knows more than what is there.

Q. Let me try to clarify. You said someone said there were two copies of the letter. Who's the someone?

A. Mr. Vice.

Q. And that information you're saying you learned from some recordings that took place?

A. I was told that was brought out in testimony during the criminal proceeding, that the tape revealed Mr. Vice speaking with Lieutenant Arthur Phillips stating to him that there were only two copies of the letter. I had one and he had one.

Q. "He had one," meaning who?

A. Mr. Vice.

Q. And "I have one," meaning who?

A. Me.

Q. Okay. Are you aware of any information whereby .25 either Mr. Vice stated that he authored the letter [32] or someone -- some other person has information that they know Mr. Vice authored that letter?

A. Well, Mr. Vice accusing me -- accused me in the criminal proceeding of authoring the letter. So, I'm aware that that allegation was made. I'm also aware that he made the allegation that Kenneth Delcambre authored the letter.

Q. Now, currently are you aware of any information to support what you stated that Mr. Vice was the person that mailed the letter to you?

A. No, I do not.

Q. And, again, currently do you have any information -- are you aware of any information that finds that Mr. Vice printed the letter at the police department?

A. No, I do not.

Q. Just to follow up on the testimony that you just gave me, you said you're aware of the criminal proceedings that occurred. Did you sit in on a criminal trial?

A. No, sir, I did not. I was sequestered.

Q. You did provide testimony?

A. I did.

Q. And what was the nature of your testimony that you provided at the criminal proceeding?

* * *

[38] Q. Sure. Referencing the time that this petition was filed, what information were you aware of to support the allegation that Arthur Phillips -- again, February 7th, 2005, Arthur Phillips, Billy Ray Vice and Troy Cary, conspired, directed and orchestrated a confrontation between yourself and Joe Budwine at a Vinton High School basketball game?

A. If we are -- and I assume since we discussed this earlier, the date of this petition is 12-21-05? A number of things led me to that conclusion. One being that after taking office on July the 1st of 2005, sometime in July of 2005, Mr. Budwine came to my office and made the statement that the only reason he did what he did was because Billy Vice, when he was elected chief of police, will take care of it.

* * *

[39] A. Another is if you'll accept the fact and I will tell you the fact that that statement was never made. He entered the gym with that statement in mind. So, it was preplanned. So, when someone lies totally about an incident and about someone making a statement, it goes far in my eyes that it was an incident that was planned and orchestrated and with

the knowledge of Joe Budwine that I have, he's not capable of doing that by himself.

Q You said you had a conversation with Joe Budwine after you took office?

A. I've had two conversations with Mr. Joe Budwine after I took office, one, prior to the filing of this suit, which was in July of 2005, the other, just a few months ago when the first subpoenas came out, whatever date the first subpoena for Mr. Budwine's deposition was sent. Mr. Budwine came to my office and asked what it was in reference to. I told him generally about the proceeding. Then Mr. Budwine's statement to me is, "What do you want me to tell them?" I told Mr. Budwine to tell the truth. Mr. Budwine even requested a ride from me at that time to the deposition, that he was later able to

* * *

[41] A. I've known Joe Budwine since he was knee-high to a bullfrog. Joe Budwine's been in my house a number of times. I've shaken Joe Budwine's hand a number of times after a ballgame. Joe Budwine came in there and apologized for what he'd done and then gave me the reason for doing it.

Being in his situation as a known narcotics offender, I'm not so sure I wouldn't have done the same thing, you know, trying to get on the good side of a chief of police; but he's dealing with the wrong one.

Q. You said he apologized. He apologized about that incident that occurred at the basketball game?

A. No, sir. He apologized about saying what he said. That's the way I took it.

* * *

[42] A. He told me that the only reason that he had done it was because Billy Vice told him that once he's chief of police, if he got in trouble, he would take care of it.

Q. And when Mr. Budwine was explaining why he did it, did he say that when this conversation with Billy Vice occurred, whether it was before this basketball game or after the basketball game?

A. He did not say.

Q. Any other information that Mr. Budwine gave you when he talked to you around this July 2005 date?

A. No, sir. That was probably five minutes and that was it.

Q. Specifically did Joe Budwine make any comments about Billy Vice preparing a statement for him in regard to this complaint?

A. No, sir.

Q. He simply stated Billy Vice indicated to him he would take care of him.

MR. HART: Is there a question there?

MR. MILLER: Yeah, I'm trying to follow -- I know he said Billy Vice say he would take care of him down the road if he had problems. I'm trying to find out if there's anything in addition to that that I'm just --

[43] Q. * * * In regard to that event that occurred on February 7, 2005, at the Vinton High school, can you explain to me what you remember occurring and how this came about and just to get your observations in regard to that incident.

A. I can explain it to you very explicitly. February the 7th or February the 8th -- I realize that they're are statements and occurrences for February 7th or 8th, but the 7th I checked the calendar this morning to make sure, which is unusual for a basketball game, you know, not trying to move back better than two years. It was an unusual date.

[44] High school basketball games are usually played on a Tuesday night, but there may have been some reason it was played on Monday night. I'm not going to say it didn't happen on the 7th but it would of been more obvious for it to be on the 8th, but it may very well have been on the 7th. I don't -- I couldn't tell you what night it was.

The Vinton basketball team at the time was 0 and 30, just to throw something out. They did not have a team that year. They should not have showed up but they did and they played. They competed. They competed. I have been attending athletic

events at the school for a number of years to show [44] support. My son played there. Mr. Budwine played with my son when he was there.

This was the final basketball game of the year. So, there probably was a reason for them to play it on on something other than a Tuesday night, if it, in fact, was a Monday night.. It was the final two minutes of the game, between two and three minutes left in the ballgame. 90 percent of the people in that gym were gone.

I was sitting eight to ten rows up from the bottom of the stands and was sitting one row below my wife. My wife was situated over my right [45] shoulder. I was sitting here and I was sprawled out. (indicating) She was sitting over my -- on the -- where I had my elbows sitting on the -- that bleacher above me. She was sitting right there and directly behind me was Ricky and Theresa Watson, Ricky and Theresa Watson. Theresa is a librarian for the Calcasieu Parish library, at the Vinton library. Ricky is a U.S. Postal Service worker. He works at the Vinton Post Office. Ricky is also an ad hoc minister at the Methodist Church. We're just having a discussion. I don't -- I don't recall what it was about. Anything else, probably about the year.

The bleachers are an area, let's just say, from here to the bookshelf. What we're going to say that is, 12 feet, 15 feet? From that area, except it was to my left, are totally vacant and the bleachers from that far all the way down in front of me were totally vacant. The few people that were left were sitting in

the first and second row of bleachers to my right front, removed easily 20 feet us.

Okay. There was absolutely no one sitting in the bleachers for an area of the size of this room all the way down to the basketball court. The gym [46] is raised. The bleachers are raised, just above the basketball court. You can't get to the court.

As I said, between two or three minutes left to go in the game. We're behind 40 points. Most of the people are gone. I'm sitting there talking. Mr. Budwine comes in with two other gentlemen. One of them was Roderick Debruise, also known as Roderick Randall. His grandmother's name is Randall, Roderick Debruise. I do not recall the other individual's name. I believe it was a Budwine. I can't remember which one.

They came up. Joe actually was hopping like two steps at a time up the stairway to an area right in front of where I was laying back. He came and I actually had to move my feet for him to sit down. In other words -- excuse me -- I actually had to move my feet for him to sit down. The other two gentlemen that were with him, an area about from here to that bookshelf but on my left, so, 12 to 15 feet away, they stood at the rail, leaned on the rail and looked directly at him.

Now, with all that space, with two minutes, two and a half minutes, three minutes left in that ballgame, almost nobody else there, why would an individual come up and plop down in front of me and [47] make me move my feet so he can sit down

unless something is up. I turned to them. I turned to my wife. I turned to them and said, "Something is up here."

Mr. Budwine was wearing a set of headphones playing it so loud that I could hear the music coming out of them. So, I don't know if any of you have been around someone that's playing those and you have a conversation or he's trying to have a conversation. When you have headphones on and somebody is playing music and you want to talk to someone, you talk loud, you know, much loader than a normal voice. You talk -- if I'm talking to that -- I'm still -- because I don't realize how loud I'm talking.

Okay. Mr. Budwine started the conversation with those two individuals that were hanging on the railing over there. Every other word either was one that begin with an "F" and we don't know what that is or one that began with "Mother F."

Okay. I had been retired. I know Joe. I had been retired. I expected something. I had been retired for a couple of weeks or I turned my stuff in for a couple of weeks, officially retired. The folks that were left down there -- and I don't [48] remember who they were. I could probably check around to find out. The folks that were left were shooting glances at me like, "Do something."

I'm not a police officer anymore. Okay. So, I finally -- all I had to do was lean over about this far and I'm saying far enough to touch him. I touched Joe on the shoulder, tapped him on the shoulder and I said five words, "Joe, don't talk so loud."

When I did that, he had everybody's attention. He jumped up, began ranting and raving, saying this, saying that, doing whatever he wanted to do. The interim principal was Mitch Manual. Mitchell. Manual is the current principal. Mr. Manual was sitting down at floor level, gym floor level, down below the stands to the left front of the incident. He immediately started looking up with Joe. I did this. (indicating) He came up there, got him, removed him from the premises.

The only other thing that was curious about that incident that night is Troy Cary was there. I had not seen Troy Cary at any athletic event before or since. Vinton High School employs an off-duty police officer for athletic events. They're [49] required by the school board for security. J.C. Stone was the officer that was there that night, but Troy Cary showed up 15 minutes before this incident occurred and then left when it occurred.

Q. Okay.

A. That's what occurred that night.

Q. You said that Joe Budwine, after you tapped him on the shoulder, made some comments. What exactly did he say?

A. He was high. He was extremely high. Joe Budwine is one -- let me think of the correct term here. It's a drink that they -- it's a drink they make with cough syrup, and I can't remember the -- the direct -- the correct -- excuse me -- the correct term

for the drink. He had that in his possession most of the time and he was extremely high.

So, I don't know that Joe Budwine even remembers what he said. I don't. He started rambling and yelling and cussing. So, he had his attention.

* * *

[50] Q. So, at the ballgame and then following the ballgame that night, are you saying that Joe Budwine didn't accuse you at the ballgame or that particular night that you made that statement about, "When I'm elected chief of police, no 'N' word is going to be able to cross the tracks and go shopping in Vinton"?

A. That's correct. When I tapped him on the shoulder, he jumped up, he started yelling and ranting and raving, I don't recall what he said but none of that was there. He was then escorted from the premises, escorted into the parking lot. I followed a short distance afterwards because the game had just stopped. I started exiting the gym and Mr. Budwine was in a vehicle over on the south side of the parking lot and his statements then were, "I'm going to get you, Ricky Fox, and your [51] son then too."

So, I made a complaint to the police department in reference to that.

* * *

[52] Q. Other than Mitch Manual, were there any other school officials there around the time that this was going on with Joe Budwine?

A. I don't recall anyone escorting him out except Mitch. There may very well have been. There usually are various coaches and all that, but they usually do the clock and things like that and the concession stand is already closed down by that period of time. There's usually a coach there. The money makers -- the money takers is gone. That's usually a coach or a member of the faculty. So, as far as other school personnel that were right there on the scene, no.

Q. You mentioned Troy Cary came there and you said that he didn't show up until about 15 minutes left in the game?

A. That's correct.

Q. Where was he at?

A. The Vinton High School gym, when you walk in the [53] entrance to the gym, there is a walkway that separates the two sets of stands. There's a set of stands on the north side of the gym and a set of stands on the south side of the gym. He stood right at the entranceway there, essentially at the 50-yard line of the basketball court.

Q. And you're saying you first noticed him about --

A. That's where I first noticed him.

Q. And that was about 15 minutes before the end of the game?

A. That's correct.

Q. Did you notice when he left the game?

A. He walked out as Mr. Budwine was being escorted out, and I did not see him again after that.

• • •

[54] A. incident. I don't recall talking to him for any length of period at all about the incident, period of time.

Q You said you made a complaint -- well, let me back up. You said you made some type of complaint to the Vinton Police Department about this incident?

A. I don't recall if it was that night, immediately after the incident or the following day. All I wanted do was just make a log entry -- I wasn't familiar with Vinton Police, you know, procedure at the time. I wanted to make some type of log entry about Mr. Budwine's statements in the gym -- in the gym parking lot that night after he was ejected, after he left, where he was going to get me and my son, Ben.

Q How did you go about making that log entry? Was that a phone call or just to go to the police department?

A. It was a phone call, as best I can recall.

Q. Do you remember who you talked to?

A. No, I do not.

Q. Did you actually prepare any type of formal complaint or formal report?

A. No, I did not.

Q. It was simply just a phone call about it?

[55] A. That's correct.

Q. Now, when did you learn about Mr. Budwine saying these statements where he accused you as it's described in Paragraph 9 of the petition?

A. Sometime within the next few days. I started having people come to me and say, "Did you say this? Did you say that?"

"I don't know where that's coming from."

I learned that it had come from Mr. Budwine.

Q. So, you're saying just folks in the community came up to you?

A. That's correct. As best I can recall, that's what happened.

Q. Do you remember a person, particularly the first one that came up to you?

A. No, I don't. There was so many. No, I don't.

Q. When you say "many," how many?

A. Dozens.

Q. What was your understanding or what was being told to you from these dozens of community members you were talking to?

A. Initially my thought on the matter or my perception of the matter was that I had actually told Joe Budwine. That was what was getting back to me, that I had actually told Joe Budwine that when I'm • • •

[58] Q. Did anyone from the Vinton Police Department visit with you in regard to that complaint made by Joe Budwine, in regard to the investigation of that complaint?

A. Okay. Let's break that down. Did anyone from the Vinton Police Department visit with me? A number of the officers came by my house all the time, but none to specifically tell me about this complaint.

As I stated earlier, I don't recall who -- I don't recall who actually told me that there had been a complaint made, but I then contacted the district attorney's office in reference to the matter and they were unaware of anything.

Q. You just contacted the district attorney's office to see if there was some type of charge out there or complaint?

A. That's correct. And to further your previous question, I've never been -- I've never been interviewed by anyone from the Vinton Police

Department in reference to that complaint, which [59] was also very suspicious to me.

* * *

[60] A. These are all the folks that I'm familiar with, other than maybe the dispatchers. The police officers, they just stop by to say hi and say what's going on.

Q. But in particular, those who were complaining about being under Vice and having complaints about Vice, who would those be?

A. Porterfield, J.C. Stone. Ricky Warren was gone at the time. Porterfield, J.C. Stone, Lastrapes -- I can't recall the other officers that were there, but outside of Mr. Troy Cary and outside generally of the dispatchers, all the other officers had complaints of some sort and worries about what would happen should I be elected because there was a number of [60] rumors flourishing that I was going to clean the department up.

* * *

[64] A. At some point Mr. Phillips communicated to me during some conversation, the individuals that were also present that night in the office directly -- he directly referenced some reporters from the American Press, that at some point in the proceedings Mr. Vice was attempting to have these reporters place this incident in the paper. So, I learned that and generally that's about it.

Q. Following up on the question or that response about [65] putting it in the paper, was there ever anything placed in the paper about the Budwine incident?

A. Not to my knowledge, no, sir.

Q. Okay. Any of the newspapers, you're not aware of anything that was printed about the Budwine incident?

A. There were attempts, but they were always denied.

Q. What do you know about the attempts but they were denied? What do you know about that?

A. I contacted various papers myself to give them a heads-up and I also learned from Joe Duenas of the FBI that probably -- I would just have to say that through the conversations on the wire that numerous attempts had been made, but they were unsuccessful. At some point that came -- that was general knowledge that I had.

Q. Same question, are you aware of any newspaper that printed anything about the letter which I've identified as "Fox 2"?

A. No, sir.

Q. Are you aware of any type of media that not only -- let me specifically ask the Budwine incident. Are you aware of any other form of media that reported about that Budwine incident?

A. No, sir.

[66] Q. And same question as to "Fox 2," this letter, are you aware of any other form of media that reported about this letter which I've identified as "Fox 2"?

A. No, sir.

Q. All right. Paragraph 11 talks about, "formal complaint, offense report, report of criminal conduct was prepared by Troy Cary under the direction of Billy Ray Vice." I'm assuming that allegation is in regard to the formal complaint, offense report, regarding Joe Budwine's complaint against yourself?

A. That's correct.

Q. And what information are you aware of that would support the allegations that Troy Cary prepared the complaint?

A. I've seen the report.

Q. Okay. And additionally, what information are you aware of that it was under the direction of Billy Ray Vice?

Q. He was the chief of police. Other than the chief of police, any other information?

A. No, sir.

0. That would also be -- currently you don't have any other information other than he was the chief of

* * *

[81] break?

MR. IEYOUB: Yes. I thought it would be a good time.

(Recess taken)

By Mr. Miller:

Q. Mr. Fox, we're back on the record. In regard to your deposition, I had previously shown you what I identified as "Fox 2" and which you indicated was a copy of the letter that you received around January 2005 and it was received, as I understand, anonymously; is that correct?

A. It was received through U.S. mail and did not have a return address and no one signed the letter, that's correct.

Q. You previously stated that in regard to Paragraph 16 of your petition, that your rights were violated in particular under "e," right to not be slandered and defamed. You indicated this would be one of the incidents, the other incident being the Budwine incident. But in particular as to this incident, I believe you previously testified this, as far as you know, was not printed in any newspaper?

A. As far as I know, yes, that's correct.

Q. And you're not aware of it going out in any other [82] media form?

A. In any other media form, that's correct.

Q. Do you know if it was mailed out to other persons in the public in the Town of Vinton?

A. I couldn't tell you, sir, not to my knowledge.

Q. And I guess my question is: Were you made aware, did anybody come and tell you that they received a copy of this in the mail?

A. No, they did not.

Q. Did this letter -- did it come about to be general knowledge of the public, that they knew about this letter and what was said in the letter? The public being certain citizens within the Town of Vinton, the Town of Vinton, certain other people?

A. I don't know what's -- you have to tell me public. If it was -- if you're saying -- if you were saying does anyone other than myself and the [82] individual that was responsible for the letter know about the letter, yes. There are a number of people. If you're saying does the Town of Vinton -- has the Town of Vinton as a whole seen the letter or discussed the letter or asked me about the

letter, I would say no.

Q So, as far as your general constituents in the Town [83] of Vinton, my question would be: Was there general knowledge out there among your constituents that there was this letter that existed that I've identified as "Fox 2"?

A. At the time of this -- at the time of the filing of this lawsuit, no, but now, yes.

Q. And you're saying "now, yes." How did that come about?

A. There's an individual sitting in this room that was convicted of it.

Q. So, you're saying the coverage involved with his trial and conviction that that information disseminated out to the public of your constituents?

A. That there was a letter -- that there was, in fact, an extortion letter of some type involved, that is the knowledge that they have. Of particular incidents involved in the letter, as far as I know, no, except the judge, I guess, the clerks and the jurors that read the letter.

Q. Now, you did say that there were certain persons that did have knowledge about this letter. You said not your constituents in general but some persons. How many are we talking about?

A. That would be hard. I know my wife knew about it.

* * *

[101] Q. The past, present, future emotional distress, is that -- can you give me an idea what that's about?

A. I sleep about three hours a night now. You know, since this first incident, I sleep about three hours a night. I don't know. I don't know when I'm going to be -- when someone's going to walk up to me and call me a racist. That's not real fun at

[102] all. When you respond to a scene, everyone at the scene is black. You begin interviewing them one and from out of the crowd they yell, "He ain't going to listen to you anyway because he's is prejudice."

So, you know, there's a lot of things that have gone into this that mean a lot to me and mean a lot to my family. My daughter, my daughter was told not to go in the black community because something would happen.

So, there's a lot of -- there's a lot of behind the scenes things that probably they did not intend to happen that have occurred and it hasn't been pleasant for two years.

* * *

[103]

Q Do you know how persons in the minority community, black community, came about knowing about the Budwine incident?

A. It's a very common knowledge. I'm sure Joe Budwine told them. I don't know.

Q. You yourself don't have any particular knowledge about how that -- how that information about that incident got out to the minority community in the Town of Vinton?

A. No, I do not.

Q. As far as the -- the event with the letter, "Fox No. 2," that being sent to you, I know you have I believe as to who authored it and who sent it to you, but do you have any information or whatever information that any -- let me ask you. As to these particular persons, whether the mayor or any counsel members of the Town of Vinton, they have any involvement with this letter, "Fox 2"?

A. Do I have any personal knowledge that they do, no. Do I have any belief that they were, yes.

Q. What is your belief?

A. No. Well, Joe Budwine at the time of the incident, in January, Joe Budwine was in -- was in the Calcasieu Parish Correctional Center. His bond was somewhat in the amount of over $200,000. He was

[104] subsequently -- the bonds was either reduced or -- I don't know if R-O-I'd or not or R-O-R'd or not. At the time Joe Budwine was dating Mayor David

Riggins' daughter all during this incident, all during this incident on a number of occasions. I realized that Mr. Vice, I believe, is related to Karen Douglas. I don't know if it's by blood or by marriage but a number of times during this incident a number of councilmen's vehicles were seen at Mr. Vice's residence.

So, is there anything that I can put out on the table to specifically involve these people, no; but I think circumstantially there's a lot of things. So, if that answers your question, I just, you know -- my true belief is Mr. Vice and Mr. Phillips and Mr. Cary didn't carry this out on their own, no. That's just my belief.

Q You said that there's vehicles at Mr. Vice's residence?

A. That's correct.

Q. You were saying whose vehicles?

A. A number of councilmen. As I say, he's related, I believe, to one of them, Ms. Douglas; but there was a number of councilperson's vehicles there at numerous times.

[105]

Q Was this during the time he was running for election? A. Yes, and -- yes.

Q. Are you saying that you observed these vehicles there or you heard about the vehicles?

A. I was told. I did not observe. I didn't waste my time doing that.

Q. And then you also mentioned that Mayor Riggins helped in the reduction of the bond for Joe Budwine?

A. No, sir, I didn't say that. I said at some point Joe Budwine's bond was reduced from a sizable sum to little or nothing or R-O-R'd and at the time, Joe Budwine was dating Mayor Riggins' daughter, oneof them.

Q And if that event is true and it's related to Joe Budwine's bond being reduced, how did that -- how did that come into play as far as either No. 1, the "Fox 2" letter or No. 2, the Joe Budwine incident?

A. I believe the exhibit -- the letter, I don't believe it would come into play. The Budwine incident I would believe that it would come into play substantially if he felt that -- since his bond was reduced or he was R-O-R'd and the mayor was responsible and Mr. Vace was responsible that

[106] he had some obligation to repay them in some way. That's what I would believe. That's what I do believe, but you'll see that's not a cause for this action.

Q Do you -- do you have any information, aware of any information that mayor, city council members are involved in any way in orchestrating the Joe Budwine incident at the basketball game at Vinton High School?

A. Other than my personal beliefs, no.

Q. What about -- talking in reference to the Joe Budwine incident, what about officers within the Vinton Police Department? Are you aware of any information that particular officers, not Chief Vice but officers under Chief Vice, if they were involved in orchestrating the Budwine incident? I know you set forth in the petition Troy Cary and Arthur Philips but in addition to those two officers?

A. No, sir, not that I'm aware of outside those two officers.

Q I know you've dismissed Arthur Phillips from this lawsuit, correct?

A. That's correct.

Q. Was there any type -- was there any type of

* * *

[110] council, as well as police department being -- having any involvement with the letter which I identified as "Fox 2." Anybody else within the town that you believe had any involvement with this letter.

A. No.

Q. -- "Fox 2"? Do you have any information or are aware of any information that the Town of Vinton encourages the inference of you running for election in regard to either the Budwine incident or the letter which has been identified as "Fox No. 2"?

A. No, I do not.

Q. Do you know if -- do you have any information or aware of any information that the mayor of the other council persons with the Town of Vinton encouraged the police department to interfere with not only your election but any other elections?

A. No, I do no.

Q. Are you aware of any information in regard to the mayor of the council persons encouraging the police to create a false arrest report?

A. Not that I'm aware of.

Q. Anything like the report that was prepared in the Budwine incident?

[110] A. No.

Q. Are you aware of whether -- of any information that the mayor of the council members have ever encouraged their employees to put out any information against the other persons running for office on the same matter as this letter, which has been referred to as "Fox 2"?

A. No.

Q. Do you know if -- are you aware of any information that the mayor or council have encourage their employees to maybe defame or make false statements about persons in the community?

A. No.

Q. Delcambre, have you talked to him at all since December of 2004?

A. I saw him for the first time when he appeared to testify at the trial. I've had numerous conversations with him in the waiting area. Other than that, no.

Q. Did you-all talk in particular about this case?

A. No, sir. We were sequestered. We could not talk about either incident or incident in question there for sure.

Q. You mentioned some disciplinary actions that were taken by Louisiana State Police during your

* * *

[115] Vinton through its mayor or through its council members or other employees excluding Mr. Vice, Mr. Cary and Mr. Phillips, that any person would encourage any of those violations that you set forth in Paragraph 16?

A. At the time of this deposition, no.

MR. MILLER: I'll tender. Let's take a short break.

(Recess taken)

EXAMINATION

By Mr. Ieyoub.

Q. Mr. Fox, I'm Chris Ieyoub. I represent through Shelter Insurance Company Billy Ray Vice. Shelter is the homeowners insurer for Mr. Vice.

You understand you've been under oath today for your deposition?

A. That's correct.

Q. And as Mr. Hart correctly pointed out in some earlier depositions, you're aware that the oath, of course, is very serious. Even though we're informal in setting, it's very formal in the sense that you're going to tell the truth today. You understand?

A. That's correct.

Q. And I know from your law enforcement background and * * *

* * *

[116] Q. One category of questioning was with regard to damages that you're seeking as a result of any injuries that you may have sustained as a result of what we've really narrowed down to two events.

With regard to emotional distress, have you undergone any counseling or treatment for anxiety or emotional distress?

A. No, sir, I have not.

Q. Have you incurred any medical bills or other [117] charges that you feel like somehow directly

related to treatment or maintenance resulting from what you categorize as emotional distress?

A. No, sir, I have not.

Q. Are you currently taking any medication prescribed or over-the-counter for symptoms relating to emotional distress that you believe result from anything mentioned in your lawsuit?

A. What's that little thing that helps you sleep?. It's over-the-counter sleep agent is all it is.

Q. Unisom?

A. Yeah, something like that.

Q. Something like that? Okay.

A. Pseudo, whatever that thing that makes you sleepy.

Q. And you've mentioned your insomnia. Did you ever have complaints or seek treatment for insomnia at any time prior to the incidents described in your lawsuit?

A. No, sir.

Q. You talked about being limited to about three hours a night. How does that compare to what you were sleeping before all this occurred?

A. Roughly half or a little less.

Q. Okay.

A. I have no problems sleeping. I had no problems [118] sleeping prior to that at all.

Q. Besides, of course, your wife, who have you consulted with, if anyone, about your insomnia that you relate to these incidents?

A. No one. Let me correct that. I have a pharmacist that's a very good friend, Randy Lavoie. I've asked him about the prescription medications for sleep. He doesn't recommend them because they become habit-forming. So, I have not pursued that.

Q. Okay. Are there any other stressors in your life that you personally would attribute to your insomnia, death in the family, personal problems, anything outside the scope of this litigation?

A. No, sir. Not shooting enough ducks, does that qualify?

Q. Sometimes it can. Confining my questioning to the allegations of past, present, and future emotional distress, are you able to break it down for us in terms of which of the two events is causing you emotional distress, and if so, in what percentages?

A. I would say -- I would say 40/60, 40 letter, 60 percent Budwine incident.

Q. When Mr. Miller asked you earlier the things that are causing you concern, you mentioned with great promise the fact that you might be labeled or [119] considered a racist.

Would you consider that the chief problem or complaint that you have arising out of these incidents?

A. Well, that's probably the most major, that's correct.

Q. And would you agree with me that there are no allegations of racism or racial misconduct set forth in "Fox No. 2," which is sometimes referred to as the extortion letter?

A. I would agree with that statement, yes.

Q. So, the allegations of racism and the embarrassment that might come along with that and the bad feelings that you have about that, you relate directly to the basketball Budwine incident; is that accurate?

A. One more time. I lost you in the middle.

Q. The allegations of racism, the charges of racism, your feelings about being categorized as a racist arise out of the basketball Budwine incident; is that accurate?

A. That's accurate.

* * *

[128] Q. In other words, was he in jail at the time he came by to see you?

A. No.

Q. And out as a trustee or something like that?

A. No.

Q. Is it your understanding that Budwine is currently incarcerated?

A. That is my understanding, that's correct.

Q. All right. Do you have any direct knowledge that Billy Ray Vice had anything to do with the bond reduction for Budwine?

A. I'm attempting to recall the testimony. If you're asking for direct, that would be testimony that was made during the Arthur Phillips deposition. I don't recall what he testified to but I don't recall if he was directed by Mr. Vice or some other party to seek a bond reduction with the judge. I don't recall.

Q So, your knowledge about any participation by Mr. Vice with that event would be limited to what Arthur Phillips said in this deposition?

A. That's correct.

Q. You talk about the friends and family who were seated with you or near you at the basketball game. Have you talked to -- I'm sure you talked to your

* * *

[135] A. believe they have pursued that charge at this time I don't know if it's still pending or not.

Q. Have you thought of Possum's name yet?

A. Good question. Not yet.

Q. Okay. We have a lawyer here Possum Pousson. It's not him.

A. I'm sure Mr. Vice remembers him. I can't think of his name. At some point I will probably when I walk out.

Q. You testified that the report of the basketball incident was prepared by Cary. Do you have any specific personal knowledge that vice prepared any portion of that report?

A. No, I do not.

Q. Somebody has to have the unpleasant task of asking you this question. So, please don't be offended. There are allegations in this lawsuit of racism. Are you or do you consider yourself a racist in any respect?

A. Sir, my wife is Japanese. She's not white. I'm not a racist in any shape, form, or capacity, never had been and never will be.

Q. Since you've been involved in law enforcement, have you ever used the "N" word?

A. I'm sure I've used it a number of times as I've

[136] used it in this thing as a quote, when I'm quoting somebody. I can't recall having used the "N" word in 30 years. I guess maybe sometime in the

first five years while I was in the Marine Corps I may have, but I can't recall using in it rage, in anger and even in conversation. In fact, folks in town when they're speaking with me and let the "N" word out, they will turn and apologize. So, we'll see.

Q. What about in jokes?

A. I don't tell those kind of jokes, sir.

Q. Okay. You understand why I'm asking you?

A. Certainly.

Q. All right. So, your testimony is you do not use the "N" word and you can't recall having used it other than quoting somebody else within at least the last 30 years?

A. That's correct.

Q. I told you we would be skipping around here. Other than being called a racist, what other elements of these two incidents have caused you emotional distress or anxiety?

A. Other than being labeled a racist?

Q. Yes, sir.

A. Worrying about my daughter's welfare. When a number of her friends are black and we've been --

[137] my wife has been told that it would be better off if she did not go visit any of her friends in the

black community, that causes me concern about the health and welfare of my daughter.

My daughter's car has been vandalized since the incident. Whether it's connected or not, I don't know. It didn't happen before.

Q. You would agree that those particular concerns evolve as a result of possible perception that you're a racist or your family might be racist?

A That those -- would you say that again? That those --

Q. Yes, sir. You mentioned some specific concerns as they relate to your daughter. You would agree that those concerns arise out of the possible perception in the black community that you might be a racist?

A. I don't agree with that. I believe that -- I believe that the -- that they arise out of the fact that I was falsely accused of being a racist by someone in the black community. I think there's a big difference.

I don't believe that -- I don't believe that the black community as a whole just decided I was a racist. I think the black community decided that I was a racist when they were given information

[138] that's in this lawsuit.

Q. Right. I think we're saying the same thing.

A. I don't think that we are. I don't think we were.

Q. Well, as between the two incidents that form the basis of your lawsuit, whatever the perception is in the public about whether you're a racist stems from the basketball event?

A. That's correct.

Q. Okay. And the concerns that you expressed about your daughter's safety have to do with the fact that you might be perceived as being a racist?

A. That's correct.

Q. Okay. I kind of interrupted you. What other elements of these two events have caused you direct emotional distress or anxiety?

A. Whether or not the charges in this letter have been made public by anyone else that has it and I can just only assume that Mr. Vice has it. I don't know who else he may have shown the letter to. That causes me a lot of concern.

The letter, the incident, I'm still in office. What is next? I'm not so sure that this chain of events has ceased. What is next? Every time I go around the corner, every time I handle an incident, every time the racist thing is thrown in my face,

[139] what is next?

Q. I'm just summarizing here. Is it fair to say that you have emotional distress and anxiety associated with fear that maybe the letter has been published or might be published?

A. I don't say a fear. I would say the uncertainty.

Q. Okay.

A. I don't think you can have a fear and be in law enforcement, although I've been scared a few times.

Q. Who would you consider your family doctor?

A. I really don't have one; but if I had anything close to one, it would probably be Dr. Helm in Sulphur.

Q. Have you ever gone to one of these sleep labs to have your sleep patterns assessed?

A. No, I have not.

Q. Have you ever been told that you have sleep apnea or any other illness that might affect your quality of sleep?

A. No, I have not.

Q. You testified earlier that the Vinton Police Department has done nothing with regard to the offense reports from the basketball incident. Is that true under your tenure, as well?

A. That's correct.

[140] Q. And why have you not initiated any action with regard to that incident?

A. I still have this pending. I have not -- until this is pending and finished with, then I'll do

something to have it expunged from the record at Vinton Police Department.

Q. Under Paragraph 18, some additional items of damage include embarrassment, humiliation and damage to reputation. I don't want to unnecessarily go through those if your testimony is going to be that you've already testified about the things that make you embarrassed, humiliated, or damaged your reputation. If you want, I'll give you the opportunity to tell me if there's anything in addition to what we've already discussed that causes you damage in those areas.

* * *

[145] Q. of the extortion letter is that to the best of your knowledge that Troy Cary was in no way related to that letter. Is that a fair representation of what you testified to?

A. That is a fair representation, yes.

Q. You have no knowledge whatsoever that Mr. Cary was involved I that in any way?

A. That's correct.

Q. Then I won't ask you anything else about that.

The Budwine incident, my appreciation of that, as you discussed it, was Mr. Cary was involved in two ways. The first was that he was actually at the gym. The second was that he actually was the officer who took the report when Budwine made the report.

I'm going to ask you about them individually, but am I missing anything as to Mr. Cary's involvement in the Budwine incident?

A. I think that covers it.

Q. I believe you testified that you saw him at the gym about 15 minutes or so before the end of the game; is that right?

A. That would be close. I believe they said somewhere -- I believe half time, they got in there somewhere, but I think it was around 15 minutes.

* * *

[146] Mr. Cary, I seen him about 15 minutes before the incident.

Q. Was he in uniform at the time?

A. Yes, he was.

Q. Did you see him at any point with Mr. Budwine?

A. No, I did not.

Q. As I appreciate it -- I've never been to the gym. As I appreciate it, essentially he was in the entryway and there was seats on both sides of the gym. You're on one side of the gym and there are other seats on other side of the gym.

A. No, that's not correct.

Q. Okay. Then tell me where he was.

[147] A. He was -- he was -- when you enter the gym, you're in a foyer. That includes the concession stand and the restrooms. You go through a walkway. The walkway separates two sets of stands. The visitors and the home sits on the same side.

Q. Okay.

A. The stands are elevated from the playing court by 3 feet probably. That is also has a railing around it. You walk directly there. They do not allow anyone to stand on the railing or to stand there at the entryway where you come in to go right or left into the stands. He was standing at that point.

Q. Okay. So, he was basically standing in the entryway. He never walked into the stands to the best of your knowledge?

A. That's correct.

Q. Okay. I know that you said that in retrospect, you found it odd him being there because you have never seen him at any other Vinton athletic or Vinton High School athletic events; is that correct?

A. That's correct.

Q. Can you say as a fact he had never been to any others?

A. No, I cannot.

Q. Okay. You just know that you had not seen him [148] prior to that?

A. That's correct.

Q. Okay. Is that the only fact that made it suspicious to you?

A. That is not the only fact. Why would he show up with two minutes, three minutes, four minutes left to go in the game, you know, just shortly before that and he showed up roughly the same time that Mr. Budwine and the other two did.

* * *

[150] Q. Okay. I know that you said earlier that you reviewed the reports. Sergeant Cary was the officer who took the report?

A. Not only that, he was also the reporting officer. That seemed strange to me, "reported by Sergeant Cary." It wasn't reported by Joe Budwine. It was reported by Sergeant Cary and investigated by Sergeant Cary. That seemed very strange to me.

Q. All right. I'm not a policeman. Tell me why that is strange to you.

A. Why would -- why would the officer be the reporting officer? He's not the complainant.

Q. Okay.

A. Reported by complainant, reported by Mr. Hart, reported by someone. The complainant is

normally reported by. The officer's name does not ordinarily go in there.

Q. Okay.

A. The reported by is the complainant. So, reported by seems to me that should be Joe Budwine but in [151] this case, it's not. It's Troy Cary.

Q. Okay. In reference to the report -- and I know that you've heard the depositions of Joe Budwine and Officer Phillips regarding the report. Other than those depositions, what information did you have as to Mr. Cary's involvement with that report?

A. Nothing that I recall.

Q. Okay. So, subsequent to the report being written, at some point you saw that said "reported by Sergeant Cary" and that he was the investigating officer; is that correct?

A. That's correct.

* * *

[154] Q. -- other than the misspelling of the word "Chief"?

A. No, sir.

Q. Do you know where the allegation came from, which is contained in Paragraph 8, that the letter was printed at the police department?

A. No, sir, I do not.

Q. You don't know anything about that?

A. No, sir.

Q. Any is there something -- well, I guess it's the same as sent the letter, but the last part of Paragraph 8, is there anything other than the conviction that makes you believe that Mr. Vice is the one that caused the letter to be mailed to you?

A. No, sir.

Q. And the allegation in Paragraph 9, that these three individuals conspired and directed and orchestrated this confrontation between you and Joe Budwine at the ballgame, what evidence do you have that makes you believe that Mr. Vice was part of this conspiracy to direct and orchestrate this?

A. Just my feelings on what Mr. Budwine said.

Q. Okay. And what Mr. Budwine said I believe you testified was that -- and this was sometime after the fact, a significant period of time after the fact, Mr. Budwine said to you, .what?

[155] A. If he was to make the statement that when Mr. Vice was elected chief of police, he would take care of his problems if he was arrested, along those lines. * * *

[156] Q. This allegation that's contained in Paragraph 9, concerning the statement that you supposedly said about keeping blacks on the other side of the track or whatever. Have you ever heard that attributed to or coming from anyone other than

Budwine? In other words, are you aware of any allegation that anybody else has heard you say that, other than Mr. Budwine?

A. Yes, sir. Here comes the name again. Nathan Taylor for one. Nathan Taylor is a very -- very prominent member of the black community. In February -- in February, right. In fact, a week after this incident, which would be around February the 14th, Valentines Day, they had a -- they had a gathering at the community center for the elderly, the senior citizen's center. They had a Valentine's dance for them.

I had an appointment like 11:00 that morning. So, I went by to tell them -- because I normally helped them and I went by to tell them that I would not be able to make it and Mr. Nathan Taylor and another black friend of his, a male, who has since died, he's deceased now, was present.

I went by. I had never met Mr. Taylor. In [157] all these years I lived there, I didn't know him. He's a prominent member of the black community. He's also one of the founders of the 25 Men Club, 25 Men of Distinction. I went by and introduced myself, he said, "I know who you are." You know, I was kind of taken back by it. Then at that time, I brought up the issue that was pending about my alleged statement to him and his quote to me was "Why should I believe anything you say as opposed to a member of the black community?"

So, he was very aware, very aware. The conversation was meant to be cordial when I

approached him. It became confrontational. So, he was a very aware of it.

Q. Wait. Let me interrupt you there because I think we're on different tracks here.

What you're telling me is that he was aware of Mr. Budwine making the allegation that you made the statement; is that right?

A. I guess that would be the -- I guess that would be the -- he was -- he was -- my understanding of the conversation he thought I made the statement. Now, who told him that --

Q. That wasn't my question.

A. That was -- that was my understanding of your [158] question. I'm sorry. Try it again. Try it again.

Q. I apologize if it wasn't clear. Let me try again. My question is: Are you aware of anyone else making an allegation that you said this statement, other than Joe Budwine making that allegation?

A. If I'm asked, did you say that? Is that what you're after?

Q. No. Are you aware of anyone else claiming that they have heard you say that other than Joe Budwine?

A. No, I'm not.

Q. Okay. I apologize. My question wasn't clear at first.

A. No, I'm not.

Q. Paragraph 10 of the petition refers to a complaint against you for disturbing the peace by racial slur. Was that a charge that was contained in that complaint?

A. It's very similar to it. I can't -- I can't -- looking at the complaint, it's very similar. I don't know where you're going to find that in Title 14 but, yes, it's there.

Q. Okay. You've never been formally charged with any crime as a result of that complaint; is that correct?

[159]A. I have never been interviewed. I have never been arrested. I have not been cited, and I don't know if any paperwork went to the D.A.'s office. You tell me at what point I'm charged.

Q. To your knowledge, you have not been charged with criminal conduct as a result of this complaint?

A. That's correct.

* * *

Q. Paragraph 12 says, "Billy Ray Vice caused the said offense report to be shown to third persons." What information do you have that that occurred?

A. The testimony during deposition of Mr. Phillips.

[160] Q. Okay. Do you have any information other than what was in Mr. Phillips' deposition concerning that?

A. No, sir.

Q. Who were the third persons that you understand Mr. Vice showed the offense report to?

A. At least two reporters from the Lake Charles American Press.

Q. All right. And that comes from Mr. Phillips saying that in his deposition?

A. That's correct.

Q. Are those the only two individuals that you're aware of that Mr. Vice supposedly showed the offense report to?

A. To my knowledge, yes.

* * *

[163] Q. Paragraph 17 says that "the offense report was prepared against petitioner" -- I'm sorry -- "that was prepared against petitioner was totally false in its allegations and was made with malice."

If I'm understanding your testimony correctly, the only information you have that Mr. Vice was involved in the offense report comes from Mr. Phillips' deposition.

So, would that also be true concerning whether or not he did it with malice -- let me strike that.

Let me ask a clearer question. Do you have any information that the action that Mr. Vice took with regard to the offense report was made with malice or it was done with malice?

A. I believe that everything that Mr. Vice did from the time that he took office in November -- as an appointment -- in November of 2005 until he left office in July of 2002 -- excuse me, November of 2004 until he left office on July the 1st of 2005, I believe each and every action that he took

[164] against me was with malice.

He had a reason for doing it. I believe every incident that he -- the action that he took against me was with malice, yes, sir.

Q. All right. Why do you believe that he had malice against you?

A. He wanted the office. They would do anything -- they would do anything or he would do anything or they would do anything to try to keep that office. I don't know why. Like I said before, we had a very good relationship before. I think he was influenced. We'll never prove it. I think he was influenced but malice affected every judgment that he made.

Q. All right. So, all of the things that you believe Mr. Vice did to you that your suing him for, you believe his motivation was to keep the chief of police job that he had; is that right?

A. That's correct.

Q. Is there any other reason that you believe he did the things to you that are alleged in this lawsuit?

A. No, sir.

Q. Tell me again, you just went through the dates. What were the dates of Mr. Vice's position as chief of police?

[165] A. I believe he was appointed in November of 2004 and the election was April the 2nd of 2005 and I took office on July the 1st of 2005.

Q. When Mr. Vice was the interim chief, was that a full-time position?

A. As far as I know, sir. I wouldn't call it an interim chief. There was no -- he was appointed -- he was legally appointed the chief of police of the Town of Vinton.

Q Okay. I'm sorry. I thought that I had read somewhere that he was interim. Why was he appointed instead of elected?

A. There was less than one year remaining on the term of the individual and she resigned in November of 2004 to take another position at City Hall.

Q. So, he was the full-time chief of police? He was the chief of police?

A. That's correct.

Q. And that obviously is a paid position?

A. That's correct.

Q. When did you first find out that Officer Phillips was working for the FBI with regard to the -- their investigation?

A. A day or two after the Budwine incident, when I reported it to them. I reported it, the Budwine

[166] incident, to Joe Duenas, just to make him aware of it. His reply to me was -- if you would like me to continue, his reply to me was "Would it surprise you if we told you we knew that was going to happen?"

* * *

Q. [172] (By Mr. Hart) After the publication of the statements that were alleged to have been made by you at the basketball game, how did you fare in the black community in the vote?

A. I had friends who wouldn't talk to me. I had one lady -- and I understand she's involved in the NAACP in some way, shape, or form. I thought surely they would be over there and they never did. Her two sons played football with my son and.

My son was on the quarter final championship team at Vinton in '98. That was the year her son graduated. Her other son was a senior along with my son. They were linebackers. Shortly after the [173] incident, I saw her. I tried to talk to her about the

incident and she said, "It will all come out. I don't have anything to say."

So, you know, you go to -- you go-- as I stated earlier, you go to an incident now that involves the blacks and at some point it's going to come out, "He ain't going to listen to you. He's prejudiced."

So, I think in conducting -- in conducting the duties of the office, it's had a profound effect, which I'm trying to overcome daily. Personally it's had a profound effect and I'm trying to overcome that daily. You know, professionally -- professionally comes with me first. I got to -- I've got to have the trust of those people so we can have information when we need it and I don't have that right now. So, I'm going to come forward some way.

* * *

[176] Q. Well, in the ten years you told us about where you've attended 100 percent of the home football games and 85 percent or 80 percent of the basketball games, did you ever see Troy Cary at any of those games?

A. No, sir.

Q. Was this the last game of the season?

A. Very last.

Q. For the Budwine incident?

A. Yes, sir.

Q. Was Vinton down by a hopeless margin?

A. More than hopeless.

Q. Were they winless on the year?

A. Yes, they were.

Q. And was this the first time you ever seen Troy Cary at a game?

A. Yes, it was.

Q. Did this come as a matter of weeks after you received an extortion letter in the mail?

A. It came as matter of -- that was on the 7th, somewhere within three or four weeks, if not less.

* * *

Q. [184] I guess what I'm trying to nail down is nobody come up to you and said, "I heard about that incident and I know folks thinks that you're a racist and I'll tell you where I heard it from. Joe Budwine was telling me about the whole deal."

I mean, did you have anybody come up that particularly said they heard it from Joe Budwine versus Mr. Vice versus Mr. Cary versus Mr. Phillips?

A. I had a number of people come up and tell me that they heard from it someone but refused to tell me who it was from.

Q. Okay. As far as what I identified as the "Fox 2"

* * *

Q. Earlier you were asked about Chief Vice using or having abusive power. You indicated that you thought he was doing this, abusing his office to keep that office. Then you said -- also mentioned [185] they were doing it making it plural, referencing meaning more than one person in addition to Mr. Vice. Who else were you referring to?

A. Well, I guess that would include Mr. Phillips and Mr. Cary.

Q. Are you aware of any other persons within the Town of Vinton that were out to do these whatever they could to keep Mr. Vice in that chief of police position?

A. That's a rather broad question, Counselor. Aware of, specific knowledge of the letter and along those incidents, no; but do I think that there were others, yes. Specifically to your question, no.

Q. Who do you think?

A. I think Mayor Riggins was.

Q. How do you -- I mean, what caused you to believe that Mayor --

A. He took him everywhere he could. He took him to funerals. He took him everywhere he could. I don't know -- it's beyond me why a mayor of a

municipality would support an individual that has not served a day in law enforcement over an individual that's been there for 33 years at the time, openly politicked for him.

First thing, I'm not -- I'm not a politician. [186] First thing that an old politician told me, "Don't ever get involved in anybody's race but your own." For him to be out openly politicking for that man, told me a lot.

Q. Other than openly politicking for Mr. Vice, is there anything in particular that you know of that you're saying Mayor Riggins was involved in these type of events that we've talked about, the Budwine incident or this extortion letter?

A. I do know that he refused to answer questions for the FBI and the state police. That doesn't tell me -- that doesn't bode well for me. I realize you can't use it against him, but it doesn't bode well for me.

* * *

A. [188] I'm not -- my limited knowledge of those wouldn't allow me to answer that question.

Q. Let me -- let me ask you this.

A. I'm not -- I'm not fully versed on what 42 U.S.C. 1983 as to be able to do that. If I sit there and looked at that, I might able to tell you. You know, we could discuss -- go ahead.

Do you -- are you aware of any information that it was a custom or policy for the Town of Vinton to infringe and violate rights as you set forth?

MR. HART: I'm here as this attorney to tell you that we're not asserting that there has been a custom in the Town of Vinton to do this. You read our motion for summary judgment. You know, we're alleging that the chief of police carries enough authority so that he acts on behalf of the Town Vinton.

MR. MILLER: What was your earlier response are you saying that you're stipulating this?

MR. HART: Well, we're not alleging it's a custom at the City of Vinton -- we'll stipulate to that -- to extort people who are running for public office there. If you'll prepare it, I'll sign it.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX
Plaintiff
VERSUS NO. 06-135
BILLY RAY VICE, ET AL
Defendants

DEPOSITION OF

TROY CARY

SEPTEMBER 5, 2007 10:15 A.M.

* * *

Q. [10] Tell me about your work history and start with the most recent job that you're on. You say you're working for a construction company?

A. Yes, sir.

Q. All right. What's the name of the construction company?

A. Chaisson Construction.

Q. What do you do there?

A. We remodel. Right now we're working here in the Garden District remodeling homes.

Q. In what capacity do you work for Chaisson Construction?

A. I'm just a carpenter's helper, laborer.

Q. You work with power tools?

A. Yes, sir.

Q. When you say carpenter's helper, laborer, are there other people who are more experienced that you work with?

A. Yes, sir.

Q. How long have you worked with Chaisson?

A. This will be the fourth week.

Q. And before Chaisson Construction, where were you employed?

A. I was in Wyoming for four months at the Barnett Ranch.

* * *

[12] Q. So you specifically looked for openings at cattle ranches up in Wyoming?

A. Yes, sir.

Q. There's a lot of states between here and there and there are a lot of cattle ranches between here and there. Why Wyoming?

A. Well, whenever I was in the military, the furthest north I went was Oklahoma and I wanted to go up north.

Q. Okay. It's early September now. And you've been with Chaisson for four weeks so you returned sometime in early August to Louisiana?

A. July 1st we arrived back.

Q. So if you were up in Wyoming for four months then you got to Wyoming in March?

A. March 1st is whenever the job started.

Q. Did you go to Wyoming before the job started?

A. No, sir.

Q. Went up there and went to work the first day?

A. Yes, sir.

Q. What was your intent when you moved up to Wyoming to take this job on the Barnett Ranch? Did you intend to make a career out of this?

A. Yes, sir, I love animals.

* * *

[29] Q. Did you believe personally that you would be fired if Ricky Fox were elected Chief of Police?

A. Well, I don't know about fired because of the -- I can't even pronounce it.

Q. Legalities? I'll quit trying to put words in your mouth.

A. It's where a new chief takes office and the whole department has to reapply. I don't know the term for it.

Q. Was it your impression that the entire police department would have to reapply if there was a change in leadership at the police department?

A. I thought they would.

Q. Did you think -- your application or your reapplication for a job at the Vinton Police Department, did you believe that reapplication would be turned down if chief -- if the Chief of Police was Ricky Fox?

[30] A. Yes, sir.

Q. So wouldn't it be fair to say that you feared for your job in the event that Ricky Fox won the election?

A. Yes, sir.

Q. And you let those feelings be known to other people besides -- you didn't keep them inside. You let that be known, didn't you?

A. Talking with Lieutenant Phillips at the time and Chief Vice.

Q. Now, during the time before the election, how was your treatment at the police department by Billy Vice?

A. Whenever I got put in the detective position, he said I was to answer to him and only to him because of my position.

Q. What was your rank before being -- was it a promotion to be a detective?

A. Yes, sir.

* * *

[32] Q. How did you find Porterfield's performance to be based on your personal experience?

A. He was well knowledgeable.

Q. Okay. And I've asked are you aware of any specific instances that you'd classify as poor performance by Chad Porterfield?

A. Not that I can recall.

Q. Okay. Were you -- were you present when Chief Vice admitted to Chad Porterfield that the reason Porterfield was being demoted was because of Porterfield's association with Ricky Fox?

A. Was I present?

Q. Yes, sir, that's the question.

A. No. No, sir.

Q. Did you ever hear that?

A. My recollection says yeah, from Chief Vice at the time.

Q. Chief Vice told you that?

A. Yes, sir.

Q. Chief Vice told you the reason he demoted [33] Porterfield was because of Porterfield's association with Ricky Fox?

A. No, he didn't say he was going to demote him because of that.

Q. What did he say?

A. Because Chad was affiliated with Chief Fox.

Q. Well, tell me what context that came up in? What do you mean? Billy Vice told you what? How did this occur?

A. I was in and out of the chief's office all of the time.

Q. Uh-huh.

A. Keeping updated on different cases that I had.

Q. No, not because you were a detective but because you were a patrolman?

A. No, sir, this is after the promotion.

Q. This is after you were promoted to detective?

A. (Witness nods.)

Q. And after your promotion, you were in Billy Vice's office and Billy Vice told you what?

A. That he -- because Chad was -- the unit was seen at Chief Fox's residence.

Q. What unit?

A. A patrol unit from Vinton and Chad was working that day and that's how that statement come up.

[34] Q. What statement come up? What did Billy Vice say?

A. Well, I don't know his exact words.

Q. I understand.

A. But, you know, Chad was working that day and he says that, you know, he was going to attempt or find a way to get rid of Chad because of his affiliation with Chief Fox.

* * *

[35] A. I had -- you know, I've heard that Mr. -- Chief Vice was going to be brought up. But I had no idea who he was.

Q. Did you know what kind of experience he had in law enforcement?

A. No, sir.

Q. Did you find out after he became Chief of Police what kind of experience he had in law enforcement?

A. I mean, I understood after he was appointed that, you know, he's never been in law enforcement before.

Q. Was it your understanding he had zero experience in law enforcement?

A. Yes, sir.

* * *

A. I mean, from my understanding, he ran prior to that appointment for the chief's position, you know. So, you know, I had no idea of his qualifications as far as his law enforcement background.

* * *

[39] A. interview part of the stop. And yes, there was -- neither one of us padded down the driver until we went to place him under arrest for a small amount of marijuana and we found several different types of pills in the trunk. We arrested all three subjects.

Q. From car number 1?

A. Yes, sir.

Q. And did he have a nine millimeter?

A. On his right side, yes, sir.

Q. I want to talk to you now about the extortion letter. Do you know what letter I'm talking about when I say the "extortion letter"?
A. I've seen it with the FBI letter and Joe and Trooper Peveto, a Louisiana State Police detective, I think.

Q. Peveto?

A. Peveto..

Q. I hand you a copy of it so you can refresh your memory. Is that the one you saw when you had the meeting with Joe Dwaynus and Kent Peveto?

A. Yes, sir.

Q. Now, you know Billy Vice has been convicted of extortion for sending this letter to Ricky Fox; is that correct?

A. I didn't know he was convicted. I know he was [40] arrested.

Q. You didn't hear the outcome of the trial?

A. No, sir.

Q. What was the first time you heard about this extortion letter?

A. I was walking into Chief Vice's office and he was ending a phone conversation and he hung the phone up and he made the statement to me that the gentleman he was talking to on the phone had a lot of dirt on Chief Fox and he was going to come and have a sit down talk with him or he was going to mail it to him.

Q. You know who that gentleman he was talking to was, don't you?

A. I want to say that same day he told me he was a retired captain from Troop D, Captain Delcombre.

Q. And this conversation that you had in Billy Vice's office, this took place before that extortion letter was mailed, true?

A. I'm assuming because I've never seen the letter except whenever the FBI agents.

Q. Well, the letter was mailed -- it's post marked January 18th, 2005.

A. Yes, it is.

Q. Okay. Does that give you any ability to say that this conversation that you had with Billy Vice in [41] Billy Vice's office was before or after January the 18th?

A. I really can't say exact date or before or after because, I mean, I don't know the date.

Q. What else did you hear about the extortion letter other than this conversation that you had with Billy Vice in his office and with Joe Dwaynus?

A. That's it.

Q. Can you tell us anything else?

A. Because whenever Chief Vice brought it up, I told him I didn't want nothing to do with that, you know. That was between him and Mr. Delcombre at the time.

Q. I want to make sure I understand. At this point you were afraid that if Vice lost the election you'd lose your job. You hear Billy Vice talking about having some dirt on Chief Fox and you told Vice you didn't want to have anything to do with it, correct?

A. I didn't want to have anything to do with that.

Q. Yeah.

A. I didn't know how he was going, you know, get it to him or mail it or what, because I was never -- that was never said.

Q. Yeah. Why is it that you wouldn't want to

* * *

[46] A. Yes, sir.

Q. Okay. And were you aware of the fact that he was in jail, in Calcasieu Parish jail with a high bail?

A. I had no idea what the bail was.

Q. All right. Did you know that somebody intervened to have the bail reduced? Did you know that?

A. No, sir.

Q. Do you know anything about having Joe Budwine's bail reduced?

A. No, sir.

Q. Do you know anything about any promises or discussions that Billy Vice may have had with Joe Budwine concerning what Billy Vice could do for Joe Budwine in return for Joe Budwine's help?

A. No, sir.

Q. Never heard of anything about that?

A. No, sir.

Q. Are you a sports fan?

A. Yes, sir.

Q. What kind of sports are you interested in,

Mr. Cary?

A. I've played basketball. I've officiated basketball, football, softball, baseball. I was raised in an athletic family.

[47] Q. Do you like to watch games?

A. Yes, sir.

Q. Okay. Watch Vinton High School games?

A. I watched one.

Q. Which one did you watch?

A. I don't remember who they were playing. I think it was the last one of the season.

Q. Was it a basketball game?

A. Yes, sir.

Q. How was Vinton doing that year?

A. Honestly, I couldn't tell you because I just become employed up there.

Q. Was that the only Vinton basketball game you ever attended?

A. Yes, sir.

Q. You ever attend a Vinton football game?

A. Away from Vinton whenever they came to Jeff Davis Parish.

Q. This was back when you were living in Jeff Davis Parish?

A. Yes, sir.

Q. You never attended a Vinton football game while you were working for the Vinton Police Department then, correct?

A. No, sir. The only time I attended a Vinton [48] High School game is whenever Welsh went to Vinton.

Q. But while you were on the Vinton Police Department staff, the only Vinton High School sporting event you ever attended was one basketball game, correct?

A. Yes, sir.

Q. And that was a basketball game of February 7th, 2005, wasn't it?

A. I don't know the date.

Q. Let me show you a communication log here. We'll attach this as an exhibit to your deposition, February 7th, 2005, correct?

A. Yes, sir.

Q. And you were Unit 510. It says right up here. I'm sorry, you were Unit 502?

A. Yes, sir.

Q. And Unit 502 arrived at Vinton High School at 17:54, is that what it says?

A. Yes, sir, that's what it says.

Q. 5:54, six minutes until 6:00. Okay. You were on duty at the time, correct?

A. Yes, sir.

Q. Why did you go to the Vinton basketball game while you were on duty for the first time you've ever been to a Vinton sporting event in Vinton in your life?

[49] A. I was working for the sheriff's office in Jeff Davis Parish I always went by the gyms to see what was happening. It was the first time I was working and Vinton played at home.

Q. Is it your testimony today that February 7th, 2005 was the first time that Vinton played at home since you joined the force?

A. I'm not saying since I joined the force that I was working that night and I realized there was a basketball game there that night.

Q. Well, how many Vinton police officers are on patrol at any given time?

A. At the time I was employed, two on the shift.

Q. Okay. So when you arrived at the game, Unit 510 which was driven by J. C. Stone had -- if we look at this communication log, had arrived at the game at 5:10, more than a half hour before you got there, correct?

A. Yes, sir.

Q. So the entirety of the Vinton Police Department on patrol that evening was at the basketball game, right?

A. Yes, sir.

Q. Did you know that Officer Stone was there?

A. Yes, sir.

Q. [50] Was there something going on at the basketball game that you believed created a need for all of the Vinton Police Department resources on patrol at the time to be present at the basketball game? I mean, was there some fights? Were there some threats that had been called in?

A. Nothing, we just stopped in.

Q. Did you know Joe Budwine was at the game?

A. I had no knowledge of who Joe Budwine was. I just knew the name.

Q. Other than the fact that you knew he was a crack cocaine dealer?

A. Yes, sir.

Q. You understand there was some kind of confrontation, an incident between Joe Budwine and Ricky Fox during that game?

A. I became aware where I was standing at, the maintenance entrance of the gymnasium. I was standing in between -- the bleachers split. There's a walkway between the bleachers and I was standing halfway up the ramp.

MR. HART: I'm going to attach to Mr. Cary's deposition a copy of the communication log from the Vinton Police Department for February 7th 2005 as Cary 1.

[51] BY MR. HART:

Q. Did you see J. C. Stone there?

A. Yes, sir.

Q. What was his position?

A. He stood with me for a while.

* * *

[61] Q. You were present when Joe Budwine came back to the police department on February 9th, the second trip, correct?

A. When I walked in, he was setting up front.

Q. How did he get to the police station; do you know?

A. I have no idea. That was the second time he was there.

Q. Correct?

A. He didn't talk to Chief Vice then.

Q. Who was present when Joe Budwine was at the police station?

A. On which?

Q. The second trip, the trip where he -- where Joe Budwine filed his complaint?

A I was radioed to come back to the station. Chief Vice was there and Lieutenant Phillips.

* * *

[62] Q. Why would they call you to field this complaint?

A. I have no idea.

Q. Well, whose job typically would it have been? Would it have been the detective's job?

A. Not necessarily, the shift supervisor or one of the sergeants could have took it.

* * *

[63] Q. Can you explain why you'd be called off of patrol to come back in to field this complaint when Arthur Phillips was present in the station and Billy Vice is present in the station? Was anybody else present in the station that would have been capable of taking this complaint from Joe Budwine?

A. Not besides the dispatcher, it was only us.

Q. Was Arthur Phillips on duty?

A. He was in uniform, yes, sir.

Q. Why would you be called back in to do it when Arthur Phillips was already there?

A. I don't know.

* * *

[68] A. I went in where he was at and I signed it.

Q. I'm going to hand you a copy of complaint number 05-000261. Is that the statement that Joe Budwine completed.

A. It's got his signatures.

Q. Okay. Do you recognize it as the statement Joe Budwine completed.

A. The best of my recollection, yes, sir.

Q. Is that Joe Budwine's handwriting?

A. I guess because he had to sign it.

Q. All right. When you write, what does your handwriting look like?

A. It depends if I'm printing or writing.

Q. When you print, does your handwriting look like that?

A. It's pretty near, yes sir.

Q. I'm going to ask you. Is that your writing?

A. No , sir.

Q. You did not write – it's your testimony you did not write this statement?

A. No, sir.

Q. How many statements did Joe Budwine make that day?

A. Only one.

* * *

[78] Q. Okay. Were you aware of any efforts at the Vinton Police Department or by anybody in Vinton to [79] have this complaint published in any media outlet?

A. I don't remember the exact date but a person from the American Press came to the Vinton

Police Department and was informed by Chief Vice of the incident.

Q. When you say someone from the American Press, who was that?

A. I want to say his first name was Eric. I don't know his last name.

Q. Cormier?

A. That's very possible.

Q. Was there another reporter there with Eric Cormier from the Lake Charles American Press?

A. There were two gentlemen. I don't know the other subject's name. They were both present in the office at the time.

Q. Okay. Did you know how they came to be there?

A. No, sir.

Q. Tell me about the meeting that you had -- tell me where you were?

A. I was standing on the left side of the desk, the chief's desk. Two gentlemen in the middle and Lieutenant Phillips was on the other side of the desk.

Q. How did you come to be -- this was in Chief Vice's office?

[80] A. Yes, sir.

Q. How did you come to be involved in a meeting between Chief Vice and the reporter from the American Press?

A. I was advised to bring a copy of the Incident Report.

Q. By who?

A. Chief Vice.

Q. All right. Well, I mean, you can bring a copy of the Incident Report, deliver it to them and then leave but you chose to stay, correct?

A. I didn't choose to stay. They started talking about the incident and Chief Vice pointed to me that it was -- my offense report was done.

Q. How is it that the reporter's from the Lake Charles American Press were present in Vinton?

MR. THOMAS: Asked and answered. Go ahead.

BY MR. HART:

Q. How did they get there? How did they find out about this story?

A. I have no knowledge.

Q. Okay. Did you ever suggest to Joe Budwine that he needs to publish this story?

A. I'm trying to recollect. The only time that was even talked about it -- was the day he filed a

[81] complaint.

Q. Well, tell me about it. What did you tell him about it at the time?

A. If the allegation was true and he felt sufficient about it that, you know, he needed to take further action with it if the DA office didn't want to take no action.

Q. What did you mean by that? You told him he needed to take further action, correct?

A. Yes, sir.

Q. What did you mean by that? You need to publish it?

A. Or go to the --

Q. Go to where?

A. You said publish it?

Q. Yeah.

A. The newspaper.

Q. Yeah.

* * *

[82] Q. You didn't suggest that he take it to the NAACP?

A. That was discussed afterwards but not with Joe Budwine.

Q. Who was it discussed with?

A. It was discussed with Chief Vice in the office.

Q. How did that topic come up?

A. I don't remember how it come up. But I know Chief Vice said there was a lady that represented the NAACP that was supposed to be coming to the office or something.

Q. What was her name?

A. I never personally met her.

Q. Who contacted her?

A. I have no idea.

Q. How did Billy Vice know about her supposed to be coming to the office?

A. I have no idea.

Q. Did she come to the office?

A. I'm -- I was told she was there. I walked in the patrol room one day and she was there.

Q. You saw her there?

A. Yes, sir.

[83] Q. So you weren't told -- not only were you told she was there, but you actually saw her there?

A. Yes, sir.

Q. And her business as you understand it was to investigate this complaint made by Joe Budwine, correct?

A. Yes, sir, of the allegation.

Q. Who assisted her in the investigation of that complaint?

A. She was talking with Chief Vice whenever I walked into the patrol room.

Q. Where were they talking?

A. In the doorway of the patrol room at the time.

Q. Do you know if they went into Chief Vice's office for consultation?

A. I was in and out. I don't know where they went after I left.

Q. She was still there talking to Chief Vice when you left?

A. Yes, sir.

Q. How long were you present at the station while this representative from the NAACP was there?

A. I think I had to go in the office and pick something up and I walked right back out. I didn't stay there very wrong.

[84] Q. Okay. Are you aware of any efforts by Chief Vice to find out what Ricky Fox's version of the events were?

A. No, sir.

Q. Are you aware of any efforts by the Vinton Police Department or any other police agency to interview Ricky Fox or to find out -- let's just stay there to interview Ricky Fox?

A. No, sir.

Q. Are you aware of any efforts by the Vinton Police Department or any other police agency to determine whether there were any other witnesses present at the time of this alleged racial slur?

A. The subject on the bottom of the statement attached to my offense report, I attempted to contact him. He was a juvenile, and his parents refused to let him get interviewed.

Q. Okay. So did you ever talk to Ricky Fox to find out what other witnesses may have been present?

A. No, sir.

Q. The Watsons who were sitting close to Ricky Fox, were you aware of that?

A. I knew there were some gentlemen sitting there but I didn't know who they were.

Q. Isn't that what you try to do in an [85] investigation when there's allegations made, you try to get both sides of the story? Isn't that what you're supposed to do?

A. Yes, sir. But due to the election. That's why I forwarded it to the DA's office.

Q. Well, did you forward it to the DA's office before or after you attempted to get a statement from this juvenile?

A. I called them as soon as I got through with Joe Budwine's statement at the office.

Q. So you took it upon yourself to perform some investigation before you got rid of the file, right?

A. Yes, sir.

Q. But you made no effort whatsoever to contact Ricky Fox to find out who else may have been a witness, that's accurate?

A. Yes, sir.

Q. And you're not aware of any efforts made by Chief Vice to get the other side of the story either, are you?

A. No, sir.

Q. But you are aware of efforts by Chief Vice to discuss this allegation with a member of the NAACP, correct?

A. Yes, sir.

[86] Q. You're also aware of Chief Vice discussing this story with members of the Lake Charles American Press, correct?

A. Yes, sir.

Q. How is it possible that Chief Vice can present a balanced side of the story to anybody if there hadn't been any investigation done as to what the other witnesses who may have been present had to say?

MR. THOMAS: He can't speak to what Chief Vice thought but go ahead.

BY MR. HART:

Q. Mr. Cary, you've been in law enforcement for years?

A. Yes, sir.

Q. You knew that Joe Budwine was a crack head, felony offender whenever you took this statement from him, didn't you?

A. I knew he had been arrested, yes, sir.

Q. You knew he was a crack cocaine dealer?

A. Dealer, yes, sir.

Q. Since then, he's been convicted of a felony. He's serving time in prison, right?

A. I guess, I don't know.

Q. Don't you think it's a bit usual that the Chief of Police, the highest law enforcement officer in [87] Vinton, would take allegations made by a known drug dealer felon and try to publish those without even lifting a finger to find out what the other side of the story was? Don't you think that's unusual?

A. Yes, sir.

* * *

Q. Is it your testimony that you've never [88] encouraged Joe Budwine to take some kind of action and publish the story other than at the time he was at the Vinton Police Department making his complaint?

A. Yes, sir.

Q. But you did encourage him to do it then?

A. I didn't say he needed to do it in such a manner that it was like demanding.

Q. You just suggested to him that's what ought to be done?

A. Yes, sir.

Q. And that suggestion was made even though you didn't have the other side of the story, true?

A. Yes, sir.

Q. Were you ever present with Chief Vice whenever he attempted to contact Eric Cormier by telephone?

A. Not that I can recall.

Q. You don't recall being at the Vinton Police Department with Arthur Phillips when Arthur Phillips was wearing a wire and Chief Vice called -- Let me refresh your memory. You do know that Arthur Phillips wore a wire up at the Vinton Police Department?

MR. THOMAS: You have to answer out loud.

A. Yes, sir.

BY MR. HART:

[89] Q. All right. I'm going to represent to you that -- well, this is a recorded telephone -- a recorded conversation from March 21st of 2005. It started at -¬it doesn't give the time that they started on this date. I'll just flip right over here. You've been present -- you're not going to deny that you were present on March 21st, 2005 at the police department with Arthur Phillips and Billy Vice, are you?

A. I don't know the dates. I was there several times.

Q. Okay.

* * *

Q. [90] Do you recall ever being up there discussing Eric Cormier and Eric Cormier not returning telephone calls?

A. I remember something being mentioned about Eric Cormier.

Q. There had been some efforts made by Billy Vice and Arthur Phillips to contact Eric Cormier to have him come down to the Vinton Police Department in order so that y'all could share with Eric Cormier and the Lake Charles American Press these allegations made by Joe Budwine?

A. I mean, I had no idea who Eric Cormier was.

Q. Okay. But you were present whenever Eric -- whenever the conversations -- the statements'

made by both Arthur Phillips and Chief Vice about telephone calls placed to Eric Cormier, correct?

A. I don't recall Arthur saying anything.

* * *

[91] Q. I'm going to show you something here and ask you if this refreshes your memory.

"Phillips: Says knowing here should be like your boy Eric don't show up. Eric still ain't returned my call.

Vice: He was at the thing the other night.

Phillips: You talked to him?

Vice: He done a pretty good write up in the paper for me.

Yeah, I wasn't going to say nothing about [92] you though because I figured he don't like you or something because you ain't returning his calls.

Phillips: Hell, he ain't returned your calls neither.

Vice: Well, I didn't call him.

Phillips: I thought you called him and he ain't returned your calls.

Vice: Uh-uh, which means no. What's his number? I'll call him.

Phillips: It's 439. No, I'm just kidding. I don't know his number.

Vice: Did you tell him -- did you tell him what you wanted -- what you wanted him to do?

Phillips: No. I wasn't going to leave it on the recorder there in case somebody else picked up his voicemail., That wouldn't be too bright, Chief.

Vice: All right. I'm going to tell him to call you. What's your number?

Male: 304.

Do you know what Arthur Phillips' telephone number was?

A. I used to know it.

Q. Was it 304? Was that the first three digits?

A. Honestly, I couldn't tell you.

Q. Phillips: He don't know my number.

[93] Vice: What number do you want him to call you at?

Phillips: On my cell phone.

Vice: Cell phone. Can I speak to Eric, please. He's not in. No, I'll call him. Thank you.

Do you recall being present when that trans -- that exchange took place?

A. Not that one.

Q. Some other ones?

A. Just whenever Eric showed up.

Q. How long did the meeting last between Eric, the other reporter from the press, and Bill Vice?

A. I would say maybe 10, 15, 20 minutes max.

Q. What time of the day did it occur?

A. In the afternoon.

Q. Early afternoon, middle afternoon, late afternoon?

A. I'd say middle afternoon.

* * *

[105] Q. You said that you voluntarily resigned, correct?

A. Yes, sir.

* * *

[107] Q. Okay. In regard to when you were in that office over here and Mr. Vice's conversation and discussed and then you had some follow-up conversations with him after that, were you saying that Mr. Vice said that he was going to send this letter to Mr. Fox or were you saying the

person Mr. Vice was talking to on the phone was talking about sending this letter to Mr. Fox?

A. The person on -- whenever I walked into the office, Chief Vice was hanging up the phone, and he said the guy I just hung up the phone with has got a bunch of dirt. It used to be Chief Fox's supervisor at Troop D and he said he is going to either come personally and bring it or mail it to him.

MR. HART: Just for clarification, when you say "him" you are talking about Chief Vice?

THE WITNESS: Yes, sir.

BY MR. MILLER:

Q. Okay. You said that you have reviewed this petition?

A. Yes, sir.

Q. I'll hand it to you. You reviewed the [paragraphs that state that "Arthur Phillips, Billy Ray Vice and yourself conspired, directed and orchestrated a confrontation between Fox and Joe Budwine, a private [108] citizen of The Town of Vinton, at Vinton High School basketball game in The Town of Vinton whereby Joe Budwine accused petitioner of making a racial slur, i.e., When I'm elected Chief of Police no" and it has the "N" word and it's got dashes there, "is going to be able to cross the tracks and go shopping in Vinton." It says "after Joe Budwine faked the confrontation at

the basketball game, he made numerous statements in the parking lot after the game in which he stated he was going to harm plaintiff and his son (Ben Fox) in the future." That's paragraph 9 of the petition. First of all, were you involved in any type of conspiracy to have this incident happen at the basketball game as it's described in paragraph 9?

A. No, sir.

Q. Are you aware that Billy Ray Vice or Arthur Phillips in any way conspired or directed the events that are described in paragraph 9?

A. No, sir.

Q. Have you yourself ever been accused by any other person, not talking about Fox, but any other person of conspiring, orchestrating some type of event to happen whereby someone would be falsely accused --

A. No, sir.

Q. -- doing something? Are you aware of any [109] other -- while you were with the Vinton Police Department, are you aware of any other Vinton police officers engaging in such activities as conspiring or orchestrating some type of event which would cause a citizen to be falsely accused?

A. No, sir.

Q. Are you aware while you were employed with

the Vinton Police Department that police department ever set forth as a policy that it was either beneficial to act in a way such as described in paragraph 9 as setting up some type of event in order to make someone become falsely accused?

A. No, sir.

Q. Are you aware of The Town of Vinton or the police department within The Town of Vinton unofficially, not saying this is formal policy, but unofficially directing officers that it's okay to get the job done to conspire or to orchestrate some type of event that would make some citizen be falsely accused?

A. No, sir.

Q. Are you aware -- have you yourself ever been instructed by any officials with The Town whether it be Aldermen that were there while you were employed or the mayor that was there while you were employed that it was okay to orchestrate or direct some kind of event to [110] make someone be falsely accused?

A. No, sir.

Q. There's allegations in here in the petition paragraph 8 about basically it sets forth that "Billy Ray Vice sent an anonymous letter to Ricky Fox." As I understand it, your testimony is you didn't have any involvement whatsoever in any anonymous letter?

A. No, sir.

Q. Ultimately, the petition alleges that Billy Ray Vice sent this letter extorting Ricky Fox. Are you aware of any other events while you were with the Vinton Police Department? Are you aware of any other complaints of any officer with the Vinton Police Department of extorting citizens?

A. No, sir.

MR. MILLER: Y'all want to take a break?
(BREAK WAS TAKEN)

BY MR. MILLER:

Q. Mr. Cary, we just took a break. We're now back on the record. I was asking you about the alleged extortion of Ricky Fox and I believe I previously asked you about whether during your employment as an officer with The Town of Vinton whether it was a policy of the police department to engage in such activities as extorting citizens, and I believe you stated that no, [111] it was not.

A. No, sir.

Q. Are you aware of any accusations or complaints brought against any officers within The Town of Vinton while you were employed there by any citizen that they were somehow extorted by a police officer?

A. No, sir.

Q. As far as the Aldermen or the mayor, was there ever any indication from them that as far as the police, it would be okay to engage in such activities as extorting citizens?

A. No, sir.

Q. And as far as Chief Vice himself in regard to you, was there ever any message sent that it was okay for police officers within the police department to engage in such activities as extortion?

A. No, sir.

Q. In the petition, it also sets forth that "a formal complaint," I'm reading paragraph 11, "formal complaint (offense report) of criminal conduct was prepared by Troy Cary under the direction of Billy Ray Vice." And you may have been asked this already but was that made at the direction of Billy Ray Vice or was that report -- was that prepared on your own accord?

A. The chief dispatcher called me in to return to

* * *

[113] Q. they need to write a statement in a certain way?

A. On cases in the past if, you know, as far as my interview if I was called into the office we'd --

especially at the sheriff's office in Jennings, we'd take them sitting down, tell me what happened, what took place, and all that. Then I'd instruct them, you know, what you just told me, you put in statement form. But whenever Mr. Budwine was there, he was already writing his statement.

Q. But going back to my original question about when you were at the Vinton Police Department was it ever policy to tear up a person's statement because the police didn't like it?

A. No, sir.

Q. Or to direct or intimidate a person to make a statement in a certain way?

A. No, sir.

Q. As far as the town officials such as the [mayor, the Aldermen, they never sent that message down, it was okay for the police to tear up statements or to intimidate witnesses?

A. No, sir.

Q. Paragraph 16 says "the rights, privileges and immunities afforded petition," Mr. Fox would be the petitioner, "by our Constitution and laws that were [114] violated include, but are not limited to the following:" And it lists in alphabetical order "A, the right to seek public office; B, the right to be free from extortion; C, the right to be protected by unlawful interference by police; D, the right to be

protected by malicious abuse of process; E, the right not to be slandered/defamed; F, the right to due process; G, the right to not be subjected to abuse of power; and then H, other violations to be proven at the trial in this matter." In regard to those allegations as against you, I mean, did you do any actions that would be seen as violating those rights under the Constitution or under the laws?

A. No, sir.

Q. Are you aware of any other officers within the department including the appointed chief, any actions by them that would be found to be violating the Constitution or laws as set forth in paragraph 16?

MR. THOMAS: To the extent that he's asking for a legal conclusion from Mr. Cary, I object, but subject to that, go ahead and answer.

A. The only thing would be the extortion. I never heard anybody from the police department while I was there, you know, outside of the police department talking about Chief Vice, you know, slandering or

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICKY D. FOX
Plaintiff
VERSUS NO. 06-135
BILLY RAY VICE, ET AL.
Defendants

VIDEO DEPOSITION OF

BILLY RAY VICE

SEPTEMBER 6, 2007 10:35 A.M.

* * *

[9] Q. that went on in this case?

A. Oh, yes, sir. That was supposed to be just a -- we were going to talk, you know, never read me my rights or anything like that. We were just talking. I just told them that -- that, huh, Mr. Delcombre had asked me to, huh, not use his name in anything, so I didn't tell them.

Q. Well, sir, I'm just going to ask you just straight up.

A. I didn't tell them.

Q. Did the mayor of The City of Vinton, did David Riggins play any part in providing you

with some directions or guidance in any of the things that's taken place in this case?

A. No, sir.

* * *

[14] A. I would say I listened to the wrong person, maybe. And I did listen to the wrong person. It's very obvious, you know. I don't know.

Q. Is it your testimony on this that Arthur Phillips and possibly Troy Cary that orchestrated this or advised you into a course of conduct that put you where you are today?

A. Yes, sir.

* * *

A. [15] I owned my own business, B J's Auto Parts for 23 years.

* * *

[19] Q. Okay. You mentioned that -- that you had served on the City Council with David Riggins?

A. Yes, sir.

Q. So at one point you occupied an elected position on the City Council in Vinton, right? Tell me about that.

A. It was from -- gosh, I think it was '86 to '89.

Q. When was -

A. We run for two openings that they had and David got one and I got one. And it was in somebody's term had -- had left the Council and we run for that unexpired term.

Q. Did both you and David Riggins break into the City Council at the same time then?

A. No, I think -- I think David was elected – he got like 52 percent of the votes, and I think I got 48, and there's another guy that come up in there and so they had to have a runoff. David won this job, and they had to have a runoff between me and Cleo Rougeau for the second position.

Q. And you won that election?

A. Yeah.

Q. But when the Chief of Police position came open in 2004, David Riggins was mayor?

[20] A. Yes.

Q. And he appointed you to fill that slot as

Chief of Police - -

A. Yes.

Q. -- correct? The powers that you had as Chief of Police were identical to the powers that a Chief of Police would had that had been elected by the people of Vinton, true?

A. I think so.

Q. I mean, can you -- can you name any -- anything that was different in your powers --

A. No.

Q. -- as Chief of Police than if you had been an elected Chief of Police?

A. No, I don't -- I don't recall any.

Q. Okay.

A. Could be.

Q. And then when the remaining portion of the term for Chief of Police expired, there had to be an election, correct? Is that right?

A. Well, it was less than one year, so I stayed there till the term was up and then the election came on.

Q. The election was held in April 2005?

A. Right.

[21] Q. And your opponent was Ricky Fox?

A. Yes, sir.

Q. You were appointed by the mayor to cleanup the Vinton Police Department, correct?

A. Yes, sir.

Q. And that's what you did?

A. I did my best.

Q. You tried to set an example by -- and lead by example, correct?

A. Yes, sir.

Q. Conduct your affairs in --

A. It was more or less because of the department didn't have anybody to take care of the business end o the thing. That was really my job. I mean, it was -- I was Chief of Police, but I wasn't well informed in law enforcement. But like I said, law enforcement is pretty, you know, if anybody understands law a little bit, it's not really that hard.

* * *

[25] Q. -- you -- you were committed to campaigning for election to the position as Chief of Police, weren't you?

A. Yes, sir.

Q. All right. You set this as one of your priorities, one of your goals --

A. Uh-huh.

Q. -- to become elected? You had run previous?

A. I --

Q. Go ahead.

A. No, you go ahead.

Q. You had previously run for this position at an earlier election, had you not?

A. Yes.

Q. And had been defeated?

A. Yes, sir.

Q. What was your attitude towards those citizens of The Town of Vinton who were not your supporters, who supported Chief Fox?

A. Oh, I loved them all. No, I didn't -- well, you don't particularly like people that -- that are voting for somebody else. I don't know which politician would think a lot about somebody that would [26] be voting for your opponent.

Q. Did you ever use anything in your office or treat them differently through any actions in your office than you would any other citizen in The Town of Vinton?

A. Could you give me an example of something? I mean, I don't know. I -- it all depends on the -- the situation, I mean.

Q. Is -- is --

A. Could have.

Q. Is it -- is it your belief that treating the citizens who were of The Town of Vinton and supported Fox differently, different treatment would be justified or proper?

A. Well, it's -- it's like you said, you know, you're going to treat your friends as the same as you do your enemies. I guess I could say, yeah, I was -- I treated them some different, but you would have to give me a real situation to tell you what I done.

Q. Do you equate the difference in treatment that you might give citizens of The Town of Vinton who supported you versus treatment of the citizens of Vinton who might have supported Ricky Fox as the difference in treatment that you might give a friend and an enemy?

[27] A. I don't think so. I don't think I ever hurt anybody as the Chief of Police. I don't -- I don't recall hurting any of the citizens of Vinton. I might -- I might have said you know, some things about it. I don't know.

Q. Did you ever refer to certain citizens of The City of Vinton with -- in the presence of your officers in derogatory terms that you knew to be supporters for Ricky Fox?

A. Probably so.

Q. Well, you know, you were appointed to cleanup the police department, correct?

A. Uh-huh.

Q. And you're going to lead by example, right?

A. Yeah.

Q. And isn't it the duty for the police department to treat all of the citizens of The City of Vinton equally?

A. The police officers would. They -- if they stop someone, they know him, they let them go. They would let them -- you can't tell me you don't know that happens because that's pretty obvious. It happens everywhere. If the police officer stopped you, they may let you go because they know you. Would you say that? That's right, huh?

* * *

[32] Q. Were there any other communications that you had with any other officers at the Vinton Police Department during the election campaign in which the subject was discussed about paying special attention to Ricky Fox supporters for traffic citations?

A. I don't -- I don't recall any.

Q. Okay. You don't deny it then? You just don't recall it; is that correct?

A. I don't think I did.

Q. Okay. Well, sir, I'm asking you, you know, do you deny it or are you just not sure?

MR. IEYOUB: Let me object to the form of the question and instruct my client that if you don't recall it, that's a perfectly good legitimate answer and you can stick by that.

A. Okay. I don't recall it.

BY MR. HART:

Q. It's a possibility though, correct?

[33] A. Anything is possible.

Q. It's possible that you could have instructed police officers or discussed the possibility or discussed with your police officers writing tickets to Ricky Fox supporters?

A. Not probable.

Q. Yeah. But it's something you can't deny as just totally against your core character?

A. I would say no, I didn't tell them that because I mean, I don't -- I ain't going to do that just because they're a Fox supporter. But, I mean, I could have -- me and you talking hey, give him a ticket because he's a Fox supporter. I'm -- I'm not going to deny I said that maybe, but I didn't just say give everybody that's a Fox supporter a ticket, no.

* * *

[46]Q. All right. Did you make a comment to Chad Porterfield when you saw Ricky Fox standing on the side of the road on the corner; do you recall telling Chad Porterfield that you could crucify Ricky Fox with a single telephone call?

A. No, I don't.

Q. Do you deny making that statement?

A. Yes, because I certainly don't remember – I don't -- I don't know why I would Say that, I mean, but I don't remember saying it.

* * *

[47] Q. What brought you to call Mr. Delcombre?

A. A friend of mine works out in an oil company or did by the name of Glenn Broussard. They hired Mr. Delcombre evidently he has a security firm or something like that in, I think Abbeville or something like that. And they hired him -- they was -- a new company had bought them out, so Delcombre came down here to escort them off the property and make sure that they didn't come back the day that they fired them or laid them off, whatever, some of the employees. Delcombre -- him and Delcombre talked about Ricky Fox running for Chief of Police. And Delcombre gave him his card and 'hold me to call him.

So Glenn Broussard who comes to my store all the time, Glenn says he gave it to me at my store, Delcombre's card. Well, I say he gave it to me -- to [48] me at the lodge, but he said he had to go out to his truck and get it, and he did go out to his truck and get it at the lodge, but if he did it at the store, it would be the same thing, you know, it wouldn't -- wouldn't make any difference. But I asked Glenn about it and so Glenn gave me his card and he said here you need to call this guy. He knows some dirt on Fox. Well, what do you do? Its your opponent.

Do you call him? Yeah, anybody would. So I called him. And at the time he said he was busy doing something. He said call me back tomorrow. And I said okay. So I called him back, I think the next day or the next week or two weeks or whatever it was. I did call him back and he said that he didn't have the time to give me the information right then but he would fax it to me if I want him to. I said well, okay. I said, fax it to me at my store. I'll get it at my store. So he faxed it to me at my store. I went and got it at my store. I brought it to my office. I read it and put it in my drawer, where it stayed in my desk drawer for, I don't know how long. That's how it all came about

Q. You never met or saw Delcombre until --

A. Uh-huh.

Q. -- your criminal trial, correct?

A. Never.

[49] Q. First time -- did you even meet him there?

A. Only -- no, I never met him. I just -- when he came on the witness stand, that's the first time I had ever seen Delcombre.

Q. And why -- why did you ask him to fax it to your place of business rather than to your --

A. Well, I didn't want it to come to the --

Q. -- police station?

A. -- police department.

Q. Even though you brought it back up to the police department --

A. Yeah.

Q. -- after it was printed out?

A. Yeah.

Q. Why is that?

A. Well, anybody can go in there where our fax machine is and -- and get a fax.

Q. Okay. But not anybody can go to wherever you had it hide at your -- at the police department?

A. Well --

MR. IEYOUB: I'm sorry. I think he misunderstood. He said the police department fax anybody can go get it.

MR. HART: Yeah, I understand.

MR. IEYOUB: Okay.

[50] MR. HART: I did understand that.

BY MR. HART:

Q. But you brought it back up to the police department?

A. Uh-huh.

Q. Are you going to tell us now that you put it in a place that was unsecured?

A. Yeah.

Q. So even though you were concerned – even though you were concerned about having it faxed directly to the police department because anybody can get it, you brought it back up to the police department where anybody can get it; is that right?

A. No, I put it in my desk drawer.

Q. Okay.

A. I put it in my desk drawer, but anybody could break into my office easily and get in my desk drawer cause – I mean, even being a police station at the time we were in a double wide trailer and it wasn't -- nothing was secure in there. Even our evidence wasn't secure because we had -- we had some stuff that went missing, you know.

Q. What -- what happened to the fax that Delcombre sent to you?

A. After I got the letter, it was everything that [51] was on the letter. I just throwed it away.

Q. You throwed -- you throwed the fax away?

A. Yeah.

Q. As a -- as a police officer, did you understand that this letter -- I mean, how did you find out about the letter first of all? You heard about it from David Riggins, didn't you?

A. Yes, sir.

Q. You heard about it before you received the letter?

A. Yes.

Q. You received the letter at home?

A. No.

Q. Did you ever say anything differently?

A. No.

Q. Did you ever tell the FBI you got the letter at home first?

A. I don't recall telling them that.

Q. Okay. You don't deny it. You just don't recall?

A. I don't recall.

Q. Okay. When you testified at trial, you said you got it at the office at City Hall?

A. I always said I got it at the office --

Q. Okay.

[52] A. -- at City Hall. If I told the FBI, I don't know. I could have.

Q. Okay.

A. Because they -- they had kind of upset me.

Q. Well, you heard about the letter first from David Riggins?

A. Uh-huh.

Q. Correct?

A. Correct.

Q. And how did Riggins find out about it?

A. Someone called him and told him about it that Ricky Fox was at the drug store with the letter and the druggist read the letter. I don't go to that drug store, so I don't know.

Q. How did you -- how did you come to get in a conversation with David Riggins about the letter? He called you up?

A. Yeah, he called me.

Q. Specifically, to talk about the letter?

A. Yes. He called me and asked me if I heard about it

Q. And what was your response?

A. I said no.

Q. Where were you when you got the call from David Riggins?

[53] A. I was at home watching -- I can remember because this show comes on that I watch every Saturday afternoon from 12:00 to 12:30 and it was somewheres around that time right there.

Q. Did David tell you what was in the letter?

A. No, he said it was some things about Fox.

Q. Okay. Well, when -- when you heard about that it was some things about Fox --

A. Uh-huh.

Q. -- did it occur to you that hey, this is information that Delcombre faxed to me?

A. I didn't know what it was.

Q. Okay. You didn't know?

A. No.

Q. Did you even think about that fax that – when you heard about this letter that was sent to Ricky Fox, did you even think about the fax from Delcombre at that time?

A. I don't think I did. I don't remember.

Q. You still had the fax from Delcombre though at that time, correct?

A. I think so.

Q. Because that was some dirt on your opponent, right?

A. Yeah, right.

[54] Q. That was some dirt on your opponent you'd liked to got out in the public, right?

A. Yeah.

Q. You'd like to got it out. You just didn't want to have your fingerprints on it?

A. Right.

Q. You didn't want it to known that you disseminated it, right?

A. Yeah, people should have known about it

Q. You'd kept that back as ammunition, right?

A. Uh-huh.

Q. You heard about Ricky Fox getting a letter from David Riggins; and at this point, you didn't know what the letter's contents were, correct? That's what you told us?

A. I didn't hear nothing about Ricky Fox getting a letter from David Riggins.

Q. I'm sorry. You heard about -- you heard about Ricky Fox had received a letter and you got that information from David Riggins, correct?

A. Yes.

Q. Okay. And at the same time, you still had the fax from Delcombre?

A. Yes, sir.

Q. Okay. Then you got a letter?

[55] A. Yes, sir.

Q. Correct?

A. Yes, sir.

Q. Now, you're telling me you got it up at City Hall right now, correct?

A. Right.

Q. Okay. Well, tell me about it when you opened up the letter at City Hall? How was it? How was it you know, what did it come in?

A. I figured it was the same letter that Ricky Fox had got that they were talking about around town, you know. And I just stuck it in my desk drawer.

Q. Well, when you get a letter?

A. Yeah.

Q. Okay. You open your own mail, right?

A. Yeah.

Q. You look at the letter and what was the return address on it?

A. There wasn't none.

Q. No return address?

A. (Witness nods.)

Q. That's unusual, isn't it?

A. Yeah. But I just -- when I open my mail, I throw the envelope in the garbage can usually.

Q. Okay. Well, you throw the envelope in the [56] garbage can. You open the letter and you read the letter?

A. (Witness nods.)

Q. Okay. Once you look at this letter, didn't you want to go back and get that envelope as some of the evidence?

A. I looked at it. I looked at it to see what the address was on it. There wasn't none.

Q. You didn't save the envelope?

A. No.

Q. Okay. Well, you looked at the letter?

A. Uh-huh.

Q. And at that time, you read it --

A. Right.

Q. -- right there at City Hall, correct?

A. No, in the police station.

Q. At the -- oh, you carried it to the police station?

A. I carry all my mail over there and open it at the police station.

Q. Okay. Thank you for clarifying that. You picked up all your mail from City Hall and you carried it to the police. office. That's where you opened up the letter?

A. Yes.

* * *

A. [63] As far as I knew of. Nobody else had come forth with one.

Q. Yeah. You didn't qualify it with that, did you? You didn't say as far as I know there's just two copies. I mean, you said there's two copies?

A. I could have.

Q. Because you had one and Ricky Fox had one, correct?

A. Yeah. I figured they just sent it to me and him because we was the two running.

Q. At some point you were contacted by the FBI and asked to provide an interview, weren't you?

* * *

[64] Q.. time, you did admit to the agents that you had received a copy of this extortion letter in the mail at your residence, didn't you?

A. I don't think I did. Of course, I don't know why I would say that because I didn't receive it at my residence. I received it -- received it at the police station.

Q. And did they -- did they press you for the identity of the person that you thought sent the letter?

A. They wanted to know who sent the letter. And I wasn't positive about who sent the letter.

Q. Did they pressure you? Did they pressure you?

A. Yeah.

Q. Did they continuously ask you?

A. Oh, yeah.

Q. Okay. Did you decline to answer them?

A. Yes.

Q. Okay. At some point in the interview, did you tell them not once, not twice, but three times, that you, in fact, were the one who wrote the letter?

A. No. Did I say I'm the one that wrote the letter? No. I said if you say I wrote the letter, you got the proof, I guess I wrote the letter. But they wouldn't produce any of the facts and I knew I didn't

* * *

[73] Q. Let's talk about your police officer, Chad Porterfield, for a moment. When you assumed the role of Chief of Police of the Vinton Police Department, Chad Porterfield was the only detective in that department?

A. Yes.

Q. And while you were serving as the Chief of Police, you did demote Chad Porterfield to being a patrolman from detective; correct?

A. Yes, sir. I demoted him when I took him out of the detective spot. I didn't demote him in rank or anything like that because of so many things that I had, complaints I had had.

Q. I understand. But to Chad Porterfield or anybody else in the police department, they perceived that as a demotion, didn't they?

A. I guess so.

[74] Q. And in Chad Porterfield's place you put Troy Cary?

A. Yes, sir, Troy Cary.

Q. Isn't it true that during a meeting that you had at the Vinton Police Department with Chad Porterfield, that you at first told him that it was a demotion for poor performance?

A. Uh-huh.

MR. IEYOUB: Yes or no?

A. Yes.

BY MR. HART:

Q. Isn't it also true that later on you told him the real reason that he had been demoted was because of his association with Ricky Fox?

A. No.

Q. Did you chastise or criticize Officer Porterfield for having associations with Ricky Fox?

A. While on duty, yes. I told him whatever he done off duty was his problem. But on duty, he didn't need to be seen in the car at Ricky Fox's house. In fact, I know three times that City Councilmen seen him at Ricky Fox's house and called me including the day of the incident.

* * *

[75] Q. treatment, you deny that you even made that statement, true?

A. Yeah. I mean, I would have done that if he was a Ricky Fox supporter or not.

Q. Apologized to him?

A. No.

Q. Demoted him?

A. Demoted him.

Q. You deny the apology, correct?

A. Yeah. I don't recall it. If I did, I don't know what I apologized to him for.

Q. I'd like to talk to you now about -- I'm going to go to the basketball game incident.

A. Okay.

Q. You know what I'm talking about?

A. I know.

Q. Whenever I mention the basketball game incident don't you, sir?

A. Yes, sir, but I don't know anything about it

Q. You know Joe Budwine though, don't you?

A. Uh-huh..

MR. IEYOUB: Yes or no?

A. Yes. At that time I think I had met Joe Budwine one time.

[76] Q. He had been arrested -- didn't you make the arrest on him?

A. The day we made the arrest on him, yes, sir.

Q. And that was back in January of 2005?

A. Lord, I don't know. I don't recall. Me and Arthur was coming back from Lake Charles and they were driving erratically, and so we pulled them over and they had drugs in the car.

Q. And Joe Budwine was incarcerated? Y'all took him to jail?

A. I think so.

Q. Bond?

A. I'm pretty sure, yeah.

Q. You had a high bond set for him, too, didn't you?

A. Yeah.

Q. And somehow that bond got reduced, correct?

A. That's what I heard.

Q. Were you aware of that?

A. I wasn't until after all of this come out. I didn't know anything about the reduction of the bond when -- before all of this took place.

Q. Did you have anything to do with it?

A. No, I didn't.

Q. Did you hear anything that David Riggins had

* * *

[77] Q. You were here yesterday when Troy Cary was questioned about Troy Cary's presence at the basketball game of --

A. Yes, sir.

Q. -- February the 7th?

A. Yes, sir.

Q. As Chief of Police, do you approve of that kind of deployment for your forces having both officers on patrol at the basketball game at the same time?

A. Well, not really. I don't -- I don't want any of them in the same place at the same time

unless there is a need for it. But at a basketball game, there's not a need for it unless they have a problem.

* * *

[78] MR. HART: Counsel is correct. He's never been to a Vinton basketball game in his life. This is the first one.

BY MR. HART:

Q. Why was he there?

A. I really don't know. I couldn't tell you. was -- I was home. I don't go to no basketball games. I've never been to a basketball game. Yeah, I have, yeah.

Q. Did you direct him there?

A. No.

Q. Okay. There was an incident at the basketball game that night, correct?

A. Yes, sir.

Q. When did you learn of it?

A. The next day when I came in. It was on -- I always read the reports at night, what happened, and it was on the report that Ricky Fox had called and made a -- not a complaint. He just wanted a paper trail of it that him and Joe Budwine had had a

confrontation, and I didn't know what it was. I got several calls about it. But I thought it was just going to blow over, you know. I didn't know nothing about it until I found out later that Joe Budwine came in my office the next morning, came to my office and -- to talk to me about it and I * * *

* * *

[82]Q. might be advantageous to Billy Vice in this race, true?

A. True.

Q. Okay. Now, the next day, you also learned that Joe Budwine had come by the Vinton Police Department?

A. No.

Q. When did you learn that?

A. Oh Lord, that was -- I learned that, I believe, on Arthur Phillips' deposition.

Q. So if Joe Budwine testified that he came by your office to see you and you weren't there and he left word for you, he would be mistaken?

A. No, no, no, he probably wouldn't be mistaken but I never got the message.

Q. So your staff was just inefficient in passing that along?

MR. IEYOUB: I object to the form.

MR. MILLER: Object to the form.

BY MR. HART:

Q. Is that what -- is that what had to have happened if Joe Budwine testified truthfully that you just didn't get the message?

A. Well, from listening to Joe Budwine deposition.

Q. That's not the question. That's not the [83] question that's on the table.

MR. IEYOUB: You asked him to interpret Budwine's deposition. He happened to have been at Budwine's deposition. So he can answer in that context.

BY MR. HART:

Q. Did you understand Joe Budwine to say I came by the police department the next day, Billy Vice wasn't there, and I left a message for him?

A. I don't think he left a message. I think he said I'll come back to see him or something like that. Because Joe won't leave a message for anyone. I mean, Joe is a drug dealer. He's not going to leave any messages.

Q. Are you that familiar with Joe Budwine's --

A. I am now, right.

Q. habits?

A. After all of the depositions and everything, but really I didn't -- I didn't know anything about Joe Budwine until -- until we stopped him on the interstate that time.

Q. All right. And are you -- are you telling us today that based on your more secure familiarity with Joe Budwine, based on the deposition that you sat through, that you're able to discern Joe Budwine's [84]habits concerning leaving messages; is that what you're telling us?

A. No, I'm not telling you any of that. What do you think about a drug dealer? Do you think he's goingto leave messages? I don't think so and I don't -- I never got a message from Joe Budwine came to see me. Is that what you want to know?

Q. You didn't get the message?

A. No, never did.

Q. All right. Isn't it true,that you dispatched Arthur Phillips to go get Joe Budwine and pick him up and bring him to the

A. No.

Q. -- police station?

A. No, it's not true.

Q. Is it your testimony that Arthur Phillips did that on his own?

A. Yes. When I knew Budwine was coming to the station is when Arthur called me and asked me to open the back door because he was coming in with Joe Budwine.

Q. And that was a total surprise to you?

A. Yeah.

Q. When Joe Budwine appeared?

A. Right. I had really kind of forgot about it

* * *

[86] Q. would help him with future problems that he might get into?

A. No.

Q. Any trouble that he might get into?

A. No. I told Joe Budwine just like I would tell you. If you need any help, call me. I told everybody

[87] that. Now, if Joe said that, Joe may have misunderstood what I was telling him.

Q. I'm going to read you from his deposition?

A. Okay.

Q. And I'll ask you a question from it. This is page 74, line 2. "Billy Ray told me some words 'I can help you. He said any trouble you get in come see me." That's the exact words came out of his mouth.

A. Well, that ain't the exact words that came out of my mouth.

Q. Page -- you deny that?

A. I deny saying it like he did.

Q. Page 75, line 1, "well, did Billy Ray Vice suggest some things for you to put in this statement?

Answer: In so many words."

Do you -- do you deny that you suggested some things to go into the statement?

A. Yes, I deny that.

Q. You sat through Arthur Phillips' deposition?

A. Uh-huh.

Q. You heard Arthur Phillips say that you ordered him to go pick up Joe Budwine and you deny that, correct?

A. Yes, sir.

Q. Why was Troy Cary -- you do agree Troy Cary is [88] the officer who took Joe Budwine's complaint?

A. Yes, sir.

Q. Why was Troy Cary called in to take the complaint?

A. Because he was the officer on charge that day. He was the supervisor. Which he's a sergeant and he had a man working with him and I don't take any complaints. Arthur Phillips don't take complaints. He's a lieutenant. And that was Troy Cary's shift. mean, I suppose Ricky runs it the same way. I'm not real sure what he does. That's the normal way of handling it.

Q. You do agree that -- that Arthur Phillips was present when Joe Budwine was giving his statement, making out his complaint?

A. I don't remember that. I think Arthur was in the office with me because I -- I don't know -- Arthur came in, opened the back door for him, and we walked down the hall, and I think he had already called Troy to come in and take the -- the complaint and it seems that we met Troy in the hall and told Troy what was going on and told him to take

Budwine into his office and -- and take his complaint. Then I called -- while he was taking the complaint, I'm pretty sure that me and Arthur went to [89] my office and I called Andre' Buisson and asked Andre' Buisson how to handle this. Andre' said he wouldn't fool with it. To hand it over to the District Attorney 's office. So then I told Arthur to hand carry it to the District Attorney's office. That we weren't going to do anything with it. We weren't going to handle it.

Q. Is it your testimony that Arthur Phillips and you have personal knowledge that Arthur Phillips was not present when Joe Budwine was having his statement taken, making out his complaint?

A. I don't remember Arthur being there at all. I passed by Troy's office one time and it was only Troy and Budwine in there. That's all I can tell you. If Arthur came in there, I didn't see him.

Q. You heard Arthur Phillips testify. You were at his deposition, correct?

A. Yes, sir.

Q. Arthur Phillips testified that Joe Budwine began to complete his statement and Troy Cary took the first one and said "that's not going to be good enough;" do you remember that?

A. Yeah.

Q. You disagree with that?

A. Well, no, I didn't see that happen.

[90] Q. I didn't ask you that. But you disagree with the fact that Arthur -- you disagree with Arthur Phillips being available even to have been in a position to have done that; is that what you're testifying to?

A. Oh, no.

Q. So you don't deny that Arthur Phillips could have observed what he testified to?

A. He could have, yeah. I just don't believe Arthur -- I mean Troy would do that. Troy is a pretty good police officer. And I don't think Troy would do that. I -- I fully respect Troy as a police officer.

Q. Troy is the kind of guy that won't leave you in a bind, right?

A. Right.

Q. What kind of notice did he give you before he quit on April 11th of 2005?

A. None.

Q. None. He just walked out, left you a note and told you where his equipment was, true?

A. Yeah.

Q. Why did he do that?

A. I -- I -- I don't know. He was having a lot of problems. Troy was. Family problems. And as you know him and his wife is -- I don't know. I don't know [91] what his personal problems, but they've -- I think they're separated and divorced or whatever, and I think

Q. Have you ever heard Troy say that if Ricky Fox were elected he'd quit?

A. Yeah.

Q. Well, when he quit on April 11th, Ricky Fox had been elected, hadn't he?

A. Yes, sir.

Q. Now, you've got a complaint that's been filed by Joe Budwine and it contains some pretty politically incorrect statements that Joe Budwine has alleged to have made by Ricky Fox, right? Correct?

A. Incorrect?

* * *

[93]

Q. Did you ever tell Arthur Phillips to call Eric Cormier?

A. Later on after this incident. But I was sitting there in my office and Eric Cormier showed

up there. Arthur is the one that called him. It wasn't I.

Q. Did you ever make a phone call to Eric Cormier?

A. I never talked to him.

Q. What did you call him for, Mr. Vice?

A. I was calling about that letter.

Q. Which letter?

A. This one here, whatever you want to call it. The extortion letter.

Q. [94] Uh-huh. What were you going to call him about?

A. See if he wanted to put it in the paper because it hadn't come out in those dates that it was supposed to. So, you know, me and Arthur had talked about it, and then -- and then after we had talked about it, we got in the car, and then he turned on his -- his -- his wire and pretended, you know, that we hadn't talked about anything.

Q. Okay. So before you had this meeting with Cormier, you had called him, but you didn't get to talk to him?

A. Right.

Q. Because you wanted to have this letter published?

A. No. Not before I had the meeting with Cormier. No. I had never talked to him until he came in my office. Then after that is when we tried to call him. Arthur tried to call him first and then I tried to call him.

Q. So Eric Cormier shows up in your office?

A. Right.

Q. And you want to have this extortion letter published?

A. Yes.

* * *

[96] A. he done his job, he pretty much had the run of the police station.

Q. So Arthur -- was Arthur conspiring to drag you down whenever he encouraged you to call Eric Cormier?

MR. IEYOUB: Object to the form.

MR. MILLER: Object to the form.

A. Evidently.

BY MR. HART:

Q. Did Arthur send the -- the letter, the extortion letter to you and to Ricky Fox?

A. I don't know.

Q. Well, so there are other members, you don't know. Who do you think sent the letter?

MR. IEYOUB: Object to the form.

A. It could be three or four people.

BY MR. HART:

Q. Well, I'd like to hear them.

A. Okay. It could be Arthur Phillips.

Q. Okay.

A. Because he -- he pretty much could come and go in my office. And if he got this information that I had from Delcombre out of my office, it could be him.

Q. Okay.

A. It could be Chad Porterfield. He had the same thing, and if he gave this to Ricky, Ricky could maybe [97] add some things to it, send it out, before it gets out on the paper or put the monkey on my back about it. This is all just scenarios of what can happen. If Arthur did it, him being so close to the mayor, I don't know. They could have got together. Mr. Delcombre would be -- would probably be the first on my list.

Q. He would be first on the list?

A. Yeah.

Q. Okay.

A. Because of everything being in -- but like I said, if anybody got in my office and got in my desk, they could easily got the information.

Q. Well, I -- I just want to see -- I want to test your knowledge about what these folks have to gain.

A. Yes.

Q. Now we know Mr. Delcombre didn't like Ricky Fox, true?

A. Exactly.

Q. He admits that, right?

A. Yeah, right.

Q. But Mr. Delcombre has had this information in his possession for years, correct?

A. Right.

Q. What would Mr. Delcombre have to gain by [98] sending this letter out two or three weeks before the qualifying date saying I'm going to publish this if you if you qualify for the Chief of Police?

A. Revenge.

MR. IEYOUB: Object to the form.

MR. MILLER: Object to the form.

BY MR. HART:

Q. Revenge, okay. So we've got Delcombre's possible revenge.

A. Okay.

Q. Ricky Fox -- what's Ricky Fox's motive? What's his -- what does he have to gain by doing this?

MR. IEYOUB: Object to the form.

MR. MILLER: Same objection.

BY MR. HART:

Q. If you know, what do you know about what does he -- how do you think -- who would gain by it?

A. What I think?

Q. Yeah.

A. What I think?

MR. IEYOUB: Wait, let me expound a little bit on the objection. I'm going to continue to make objections to the form. I'm sorry for the

interruption. You said what do you known and you've asked him a question which he can't conceivably know [99] because it's in the possession and knowledge of others.

That's my objection. Subject to that, you can try to answer his questions. You can guess. I'll let you guess.

A. Well, if Ricky sent it, he knew it was coming out in the paper because it said it was -- they was going to publish it in the paper, and he wanted to get the jump on them and -- and send the letter out to everybody, but it was never published in the paper. So I -- I really couldn't tell you why he would do it except for something like that.

BY MR. HART:

Q. I'm confused. What would he have read that would have said it's coming out in the paper, the letter itself?

A. The fax.

Q. Oh, the fax that got faxed from Delcombre?

A. If Porterfield got in my office and got -- because he was always listening to conversations and things like that. He was a spy. I would say for Ricky.

Q. Okay.

A. Yeah. I mean, I don't think he would deny that either.

Q. Let's -- let's explore that just for a moment. [100] If I understand what you're saying is if there was somebody in your office who was disloyal Porterfield, J. C. Stone, Arthur Phillips that got this fax from Delcombre and then showed it to Ricky?

A. Uh-huh.

Q. Okay. If Ricky would have read that, did the fax from Delcombre say this is handwritten thing that got faxed to you, right?

A. Uh-huh.

Q. Did it say this is going to come out in the paper?

A. No.

Q. Well, then, how would Ricky think it was going to come out in the paper and just jump the gun on it?

A. Well, I'm just assuming about it there -- there's some things about him that's going to come out in the paper.

Q. Now, if that had happened then, of course, Porterfield or whoever the disloyal servant was in your office had to put it back where he got it from because you knew where it was whenever you went to look for it, right?

A. Yeap.

Q. Whenever you finally got rid of it?

A. Yeah.

[101] Q. So they didn't take it out and permanently, they would have just borrowed it, showed it to Ricky, and then brought it back, correct?

A. No, they probably went down into the next office and copied it.

Q. Copied it. Okay.

A. I mean, hey, that's -- that's just speculating now. I'm just telling you -- you asked me a question and that's what I'm telling you.

Q. So you mentioned that Chad Porterfield might have sent it.

A. Okay.

Q. What would Chad Porterfield have to gain by sending that?

A. Not Chad Porterfield. Chad showing Ricky they -- hey, I don't know.

Q. How about Arthur Phillips? I asked you for the people that sent the letter and you gave me these four names.

A. Yeah.

Q. Arthur Phillips, Chad Porterfield, Ricky Fox and Captain Delcombre.

MR. IEYOUB: Same objection.

BY MR. HART:

Q. Just trying to understand what -- what you [102] perceive their motives would have been, what they had to gain. What would Arthur Phillips have to gain by sending this letter out to Ricky Fox and to you?

A. To gain?

Q. Yes, sir.

A. I don't know. Evidently, he was -- he was against me too because the wire tap. I mean, I don't know.

Q. Do you know how Arthur Phillips came to be wearing a wire?

A. No.

Q. Is it your impression that he went to the FBI and volunteered?

A. No.

Q. What is your impression how he got involved in

this investigation, Mr. Vice?

MR. IEYOUB: If you know, don't guess.

A. I don't know.

BY MR. HART:

Q. Okay. So from where you sit right now, the only benefit you can see to Arthur Phillips if he were to have sent this letter out would have been to have destroyed you; is that right? That would have been --

A. If he would have sent that letter out?

Q. That would have been his gain, that would have [103] been his intent?

A. No, it would have destroyed Ricky.

Q. To destroy Ricky?

A. Yeah.

Q. And to destroy you at the same time that's why he was working in the investigation wearing the wire?

A. No, no, to send the letter out would have destroyed Ricky. Now, when he started taping me, hell, I don't know what happened. The FBI got a hold to him. And he was -- he was my right hand man. I mean, he was my lieutenant, next in command. And why he done this to me, I have no

idea. I still can't figure it out, I mean. Arthur -- Arthur -- he's not a very -- he's not somebody that you would really want around you all the time.

Q. But he was your chosen right hand man, wasn't he, Mr. Vice?

A. He was there when I got there:

Q. You took -- you took him into confidence; didn't you?

A. Yes.

Q. You just told us he was your right hand man, right?

A. Yeah.

Q. Did you ever see a book of notes that were

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[106] BY MR. HART:

Q. Mr. Vice, I was asking you about attempts to have things published which may have influenced the outcome of the election and you freely admit that you did try to get the extortion letter published in the Lake Charles American Press?

A. Yeah, the day I read it to Arthur. Arthur tried calling this guy, I believe, Eric Cormier and then I tried calling him to talk to him about it.

Q. And you tried --

A. That was about it.

Q. You called Eric Cormier yourself, correct?

A. I didn't talk to him though.

Q. That wasn't my question. You called for him?

A. Right, I called for him.

* * *

[110] A. Because that ain't what the attorney told me to give him.

Q. Okay. When you say "the attorney," you're talking about --

A. Andre' Buisson.

Q. I'll represent to you that Arthur Phillips reported to the FBI agent on February the 10th that you had just dispatched him to the home of Joe Budwine to have Budwine brought to the Vinton Police Department so Vice could convince Budwine to provide a statement or complaint against former Louisiana State Trooper, Ricky Fox. You deny that?

A. I deny that. Yes, I do.

Q. During the FBI interview that you gave, that you granted to the FBI, they read the letter to you, the extortion letter, correct?

A. They gave -- gave me the letter and asked me if that was what I got.

Q. And after -- after -- after you read the letter, or you told the FBI, you had no knowledge of the letter or its contents. That was your initial reaction, isn't it?

A. For about the first 15 seconds.

Q. Okay.

A. Then I told them no, I got it, the same

* * *

A. [123] that's the only thing that I've done. When we went out to the camp, we went out riding around in the boat. We didn't have a problem as far as I -- as far as I was concerned. He come in my store all the time. It was all right.

Q. Okay. So as far as you know, the only potential problem or, I guess, disagreement with Mr. Fox was concerning the election?

A. Yeah.

Q. Okay. I understand that concerning the basketball game, you deny that you had any involvement in putting Joe Budwine up to making the allegations that he made concerning Mr. Fox's statement, correct?

A. That's ridiculous, yeah, correct.

Q. Okay. And you deny that you had any involvement in telling Mr. Budwine or having him be told what to put in his statement of his complaint, correct?

A. Yes, sir.

Q. You understood that if you did put Mr. Budwine up to making a false statement that --

A. Oh, yeah.

Q. -- that would be illegal?

[123] A. Yes.

Q. You understood if you told him what to put in

* * *

[125] Q. Vinton. You've been here for some of the other depositions and you've heard my line of questioning in regard to those witnesses as to in general whether it was a, you know, policy whether expressed or implied or a custom of the police to act in certain ways and I'm just going to ask you those

same questions. Okay?

A. Uh-huh.

Q. The petition, let me hand you a copy of the petition.

A. Okay.

Q. I'm sure you've reviewed the petition before?

A. Uh-huh.

Q. Many times?

A. Right.

Q. Okay.

A. It's been a while, but --

Q. The -- of course, there's allegations regarding the letter set forth in paragraph 8 that alleges that you sent the anonymous letter to Ricky Fox and you've already testified that you did not?

A. Yes, sir.

Q. Paragraph 9 includes allegations regarding the conspiracy between -- allegedly between yourself, Arthur Phillips, and Troy Cary regarding the incident with Joe Budwine at the basketball game. Let me ask [126] you in regard to that particular -- those particular allegations. Anyone with The Town

of Vinton whether it's the Aldermen or the mayor ever direct or say that it's -- should be the policy or custom or the police should act in a way to have officers set up a citizen to be falsely accused of something?

A. No.

Q. Did you yourself during the time that you were the Chief of Police, did you ever send the message that it was the practice of officers could set up citizens to be falsely accused of some crime?

A. I would hope to think I didn't. No, I didn't.

Q. As you as chief in regard to the allegations or there's been some -- some information regarding allegedly a statement being torn up that Joe Budwine was supposed to have already put together and – and that also it was supposed to be -- Joe Budwine was directed to put certain information in the statement, in regard to those type of actions whether it be tearing up the statement of a witness or directing them to put certain information against their will in a statement, has that ever been a policy that The Town, whether it be the Aldermen or the mayor directed -- directed you during your time as the Chief of Police to act in such a way?

A. No.

Q. Or to direct your officers to act in such a way?

A. No.

Q. And you yourself during the time that you were Chief of Police, did you ever send the message or instruct or direct officers to act in such a way?

[127] A. No.

Q. In the petition it indicates that there was this false offense report was prepared in regard to Joe Budwine. In regard to that type of action, had The Town, whether it be through the Aldermen or the mayor ever directed to you that it was -- it was okay and it would be a practice of the officers to prepare a false offense report?

A. No.

Q. And then yourself during the time that you were the Chief of Police, did you ever set forth that this was a custom or a policy that your officers could do as far as preparing a false offense report?

A. No, never.

Q. Paragraphs 15 and 16 of the petition.

A. Okay.

Q. First of all paragraph 15 alleges that you and along with Arthur Phillips and Troy Cary used willful [128] and gross abuse of your power to do the things that they've alleged in the petition. Additionally, paragraph 16 sets forth that in regard

to Ricky Fox that certain rights, privileges and immunities provided to him by the Constitution and laws were violated and it sets forth A through H, those alleged violations. In regard to those allegations, in particular setting forth "the right to seek public office, the right to be free from extortion," The Town, the mayor, anyone with The Town of Vinton ever send to you that this was the type of practice that law enforcement could be engaged in?

A. No.

Q. And did you yourself, did you ever during your tenure as Chief of Police enforce or seek to enforce that type of practice to be used by your officers?

A. Never.

Q. Additionally, it refers to being unlaw -- unlawfully interfered by the police, abuse of the process. Same questions as regard to The Town. Anyone with the Aldermen or the mayor send a message that this was proper activity to be performed by your officers?

A. No.

Q. The same question again as far as you. Did you ever send that message to your officer that it was [129] okay to act in such a way?

A. No. Yeah, I -- I don't know what you're calling like abuse of power. From the time I took

office to the time just before I left office, Ricky never came to the police station. He would sit out in his car in front of the police station and, I guess, see what was going on, trying to figure out what was going on, and I used to go up to the police station sometimes 4:00 in the morning, something like that to see what was going on, just check on them, you know, and there he would be out there sitting in the parking lot, you know. I don't know why. But he would be sitting out there, you know. I've seen that several times. And after he retired, he never would come up to the police station. I -- I don't know what his problem is. I don't know if he just don't like me, but he always came to my -- my store and we talked and everything. I don't know if he got a complex after I was appointed chief or what, but he just stopped having any association with me. So, I don't know if he thought I had more power than him at this time or what. I don't know what to tell you.

Q. In regards to the allegations in the petition which set forth, you know, that you allegedly sent this letter that you allegedly with the other officers, [130] Phillips and Cary, conspired to have the Joe Budwine incident occur. In regards to those, I know you deny that you were involved in those. And my question is in regard to those type of actions being seen as an abuse of your power --

A. Okay. -- whether it's a police officer or whether it's as chief; those type of activities, did you ever as far as the chief send a message to your officers that it would be okay to act in such a manner as far as law enforcement?

A. No. You wouldn't have to send a message to Arthur. Arthur did kind of what he wanted to do.

Q. In regard to the allegation set forth, the right -- the right not to be slandered or defame, did The Town whether it be the mayor or the Aldermen ever send a message to you as far it be --

A. No.

Q. -- a policy to spread something that's not true about someone?

A. No.

Q. And the same question as to you yourself as to while you were chief. Did you ever instruct your officers that that was a proper manner of law enforcement to spread things that were false about [131] people out to the public?

A. No. That's why the Budwine never got in the paper. I got rid of it. I didn't want to have nothing to do with it.

Q. There's a general allegation of a violation of due process. In regard to your officers just in their -- their law enforcement activities of privacy rights and search and seizures, did you ever send a message to them or say that it's okay to go outside of the requirements of -- of the Constitution and perform activities that might violate due process?

A. No, never did.

Q. The same question as far as The Town, did they ever send a message to you that it was okay for law enforcement to do that?

A. No.

MR. MILLER: That's all I have.

MR. IEYOUB: I don't have any questions.

REDIRECT EXAMINATION

QUESTIONS BY MR. HART:

Q. I have a few follow-up. At the police station, do you have -- when you were chief, did you have access to a word processor, a computer?

A. Yeah.

Q. With a word processing program?

* * *

Q. [133] Did -- did -- did you explain anything about Joe Budwine's background to Eric Cormier?

A. Not that I know of.

Q. I mean, you -- you knew he was a drug dealer?

A. Well, I wasn't going to tell all of that stuff about a person. He just wanted the -- that's all I gave him was what the report said and that was it.

Q. It was okay by you if Eric Cormier just got report without having any idea about there being another side to the story?

A. Well, he -- he came in there and got it and Ricky didn't have any other side to his story.

Q. He didn't?

A. And I didn't want to handle it.

[134] Q. I thought you told me that Ricky called in a complaint against Joe Budwine?

A. That was it. That was it.

Q. Did you show that to him? Did you tell -- did you show him the called-in complaint?

A. I probably did. I'm not sure. I know he had got the Budwine -- Budwine complaint because that [134] was the reason he was there. This guy was a black guy. Joe Budwine was a black guy. If you don't understand that. I'm sorry.

Q. No, I don't. Why don't you explain that?

A. I don't know.

Q. Well, you're intimating that you understand something that, you know, if I don't, then you're sorry for me and I'm asking you why don't you explain to me what you mean by that?

A. Well, he's a black guy and Joe Budwine is a black guy. He was going to take care of Joe Budwine. He filed a racial complaint.

BY MR. HART:

Q. Did you -- did you do anything in order to investigate the other side of the story to find out the validity -- test the validity of Joe Budwine's complaint?

A. No, I turned it over to the DA's office. I figured they'd get the Sheriff's Department to do it.

SUPPLEMENTAL APPENDIX

Supreme Court, U.S.
FILED
DEC 23 2010
OFFICE OF THE CLERK

No. 10-114

IN THE

Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton, and TOWN OF VINTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL JOINT APPENDIX

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Counsel for Respondents

Petition for Writ of Certiorari filed July 15, 2010
Certiorari granted November 1, 2010

704
69

TABLE OF CONTENTS

Incident Report, dated February 10, 2005 1

Respondents' Billing Records 8

Incident Report

Complaint No: 05-000261 Incident Seq. No.: 1 ORI: LA0100400 Date Reported: 02/09/2005 at 16:01

Description: SUBJECT MADE RACIST COMMENTS AND CAUSED A DISTRUBANCE

Occurred From: 02/07/2005 at 20:01 Occurred To: 02/07/2005 at 20:30

Cleared By: Cleared Date:

Reviewed By: Troy Cary Reviewed Date: 02/09/2005

Case Status: Under Invest. Date Closed: 02/10/2005

Complainant

Complainant: JOSEPH BUDWINE

Address: 811 FANCHER STREET City: VINTON State: LA Zip: 70668

Phone: 589-0179

Victims

Victim No.: 1 Type of Victim: Society/Public

Name: JOESPH DEWAYNE BUDWINE

Address: 811 FANCHER STREET Area Code: Phone Number:

City/St/Zip: VINTON, LA 70668 Phone Extension: Phone Type:

Race: B Sex: M Ethnic Origin: Non-Hispanic DOB: 11/13/1982 Age:

SSN: DL Number: DL State:

Resident? Interviewed? Y Statement Taken? Y Occupation:

Employer: Work Phone

Hospital: Transported By: Doctor:

Aggr. Ast./Homi. Circ. 1: Aggr. Ast./Homi. Circ. 2:

Aggr. Ast./Homi. Circ. 3: Add'l Just. Homi./LEOKA Circ.:

Comments:

Offenses

Offense No.: 1 Offense Code: 14:103/A2 Victim No.: 1 Number of Counts: 1

Description: DISTRUBING THE PEACE / LANGUAGE

Nature of Offense: SUSPECT WAS MAKING RACIST COMMENTS

Location Code: GRA Location Type: School/College Number of Premises Entered:

Location: 1603 Larceny Type:

Criminal Activity1: Weapon/Force Type1: Abandoned?

Criminal Activity2: Weapon/Force Type2: Circumstance: Completed

Criminal Activity3: Weapon/Force Type3: Force Used?

Suspects

EXHIBIT
2 CARY
USCA5 511

Incident Report

Complaint No: 05-000261 Incident Seq. No.: 1 ORI: LA0100400 Date Reported: 02/09/2005 at 16:01

Description: SUBJECT MADE RACIST COMMENTS AND CAUSED A DISTRUBANCE

Occurred From: 02/07/2005 at 20:01 Occurred To: 02/07/2005 at 20:30

Cleared By: Cleared Date:

Reviewed By: Troy Cary Reviewed Date: 02/09/2005

Case Status: Under Invest. Date Closed: 02/10/2005

Suspect No.: 1

First: ROXY Middle: Last: FOX Suffix:

Address: FONTENT STREET Area Code: Phone Number:

City/St/Zip: VINTON, LA 70668 Phone Extension: Phone Type:

Race: W Sex: M Ethnic Origin: DOB: Age: 55

SSN: DL Number: DL State:

Build: Complexion: Fair Eyes:

Hair: Blond Or Strawberry Height: 5 ft. 10 in. Weight: 200 Bias Motivation: Anti-Black

Alcohol? N Computer? N Drugs? N Interviewed? N Resident? Statement Taken? N

Clothing:

MOComments: SUPECT WAS MAKING RACIST COMMENTS

Associated Persons

Property

Vehicles

Accidents

Warrants

Citations

Incident Report

Complaint No. 05-000261 Incident Seq. No.: 1 ORI: LA0100400 Date Reported: 02/08/2005 at 16:01

Description: SUBJECT MADE RACIST COMMENTS AND CAUSED A DISTRUBANCE

Occurred From: 02/07/2005 at 20:01 Occurred To: 02/07/2005 at 20:30

Cleared By: Cleared Date:

Reviewed By: Troy Cary Reviewed Date: 02/09/2005

Case Status: Under Invest. Date Closed: 02/10/2005

Incident Report

Complaint No: 06-000261 Incident Seq. No.: 1 ORI: LA0100400 Date Reported: 02/09/2006 at 16:01

Description: SUBJECT MADE RACIST COMMENTS AND CAUSED A DISTRUBANCE

Occurred From: 02/07/2006 at: 20:01 Occurred To: 02/07/2006 at: 20:30

Cleared By: Cleared Date:

Reviewed By: Troy Cary Reviewed Date: 02/09/2006

Case Status: Under Invest. Date Closed: 02/10/2006

Supplemental Remark

Narrative No: 1 Date Reported: 02/09/2006 Reported By: Troy Cary

Date Reviewed: Reviewed By:

Narrative: ON THE 09 OF FEB,2005 AT APPROX 1600 HRS. I,SGT TROY CARY,WAS ADVISED OF A COMP. AT VINTON POLICE DEPARTMENT. UPON MY ARRIVAL I MADE CONTACT WITH A JOSEPH (JOE) BUDWINE. MR. BUDWINE STATED THAT ON THE 07 OF FEB 2006, AT APPROX. 2030 HOURS HE WAS AT THE VINTON HIGH SCHOOL BASKETBALL GAME. WATCHING VINTON VS. PICKERING. MR. BUDWINE STATED THAT HE WAS SITTING IN THE STANDS AND OVER HEARD A CONVERSATION,BY A W/M KNOWN TO BE A RETIRED LOUISIANA STATE TROOPER, WHO IS CANIDATE FOR CHIEF OF POLICE IN THE TOWN OF VINTON. THIS SUBJECT IS RICKY FOX.

MR BUDWINE STATED THAT MR. FOX WAS SITTING BEHIND HIM AND HE WAS TALKING WITH ANOTHER W/M ABOUT THE ELECTION. MR. BUDWINE STATED THAT HE HEARD,ALONG SEVERAL OTHER PEOPLE IN THE STANDS HEARD, MR. FOX, MAKE THE STATEMENT THAT THE NIGGERS THOUGHT IT IS BAD BACK THERE NOW. IF HE TAKES OFFICE THEY WILL NOT BE ALLOWED TO SHOP IN THE STORES IN THE VINTON CITY LIMITS, ALONG WITH NOT CROSSING THE TRACKS.

MR. BUDWINE STATED THAT AT TIME HE RESPONDED THAT NO ONE WAS GOING TO STOP HIM FROM CROSSING THE TRACKS. MR. BUDWINE STATED THAT THEY GOT INTO A ARGUEMENT AND MR. FOX TOLD THAT HE WAS GOING TO REMOVE HIM FROM THE PREMISES. MR. BUDWINE STATED THAT HE TOLD MR. FOX THAT HE WAS NOT A COP ANYMORE, THAT HE WAS JUST A CITIZEN JUST LIKE HE WAS.

OFFICER JC STONE AND I, SGT CARY, WAS AT THE GAME. WHEN I WALKED OUTSIDE I OBSERVED THE SCHOOL ADMINISTRATOR MAKING MR. BUDWINE LEAVE THE PREMISES. WHILE MR. BUDWINE WAS WALKING AWAY HE MADE STATEMENTS, AS ALONG AS A BLACK IS INVOLOVED IN SPORTS THEY ARE OK, BUT ONCE THEY ARE OUT THE ARE NO GOOD. MR BUDWINE STATED THE ONLY TIME A BLACK PERSON CAN COME ACROSS THE TRACKS IS FOR SPORTS. MR. BUDWINE STATED THAT IF IT WOULD NOT BE ELECTION TIME THIS WOULD NOT BE SAID

ON THE 07 FEB 2006 MR RICKY FOX CALLED VINTON POLICE DEPARTMENT AND TALKED WITH DISPATCHER TIM WALTER AND OFFICER JC STONE. OFFICER STONE THAT WANTED TO MAKE A COMPLAINT ON MR. BUDWINE FOR MAKING VERBAL THREATS AT THE VINTON HIGH SCHOOL PARKING LOT. MR FOX TOLD OFFICER STONE THAT WHEN MRS. FOX AND HIMSELF WAS WALKING TO THEIR VEHICLE MR. BUDWINE APPROACHED THEM AND STATED TO MR. FOX THAT I WILL GET YOU. THAT COMP. # IS 05-000251. MR FOX DID NOT WANT A REPORT TO MADE BUT, HE WANTED A COMP. MADE. NO FURTHER ACTION TAKEN

DUE THE TO ELECTION THE VINTON POLICE DEPARTMENT TURNED ANY FURTHER INVESTIGATION TO THE CALCASIEU PARISH DISTRICT ATTORNEY'S OFFICE FOR ANY FURTHER ACTION/INVESTIGATION.

Incident Report

Complaint No: 05-000261 Incident Seq. No.: 1 ORI: LA0100400 Date Reported: 02/09/2005 at 16:01

Description: SUBJECT MADE RACIST COMMENTS AND CAUSED A DISTRUBANCE

Occurred From: 02/07/2005 at 20:01 Occurred To: 02/07/2005 at 20:30

Cleared By: Cleared Date:

Reviewed By: Troy Cary Reviewed Date: 02/09/2005

Case Status: Under Invest. Date Closed: 02/10/2005

SGT TROY A CARY
VINTON POLICE DEPARTMENT

END OF REPORT

.NTON POLICE DEPARTMENT
VOLUNTARY STATEMENT

COMPLAINT# 05-002261

I, Joe Bahena, residing at 311 Fowler Ln

do hereby give the following voluntary statement to Officer _____

of the Virton Police Department.

Phone: (Home) 559-8115 (Work) same (Pager) none

License #: _____ State CA Date of Birth: 11/11/82 Race: H Sex: M

I was sitting at the high school basketball game and [SB] Ruby Fo was sitting behind me talking about the election. Then we he and [SB] [illegible] were with the association and then asked I heard him tell some other man that if he and so other (illegible) thought it was bad luck that this time we will not be able to stop at the local food stores here in Virton, so when I heard him say that then I told him that him or anybody else can stop we been coming after the trucks. So we got to arguing about it that he said he will [illegible] me from the premises and I told him that he's not a cop anymore [SB] he's just like me a citizen.

I have read this statement consisting of ____ page(s), and I attest to the truth and accuracy of the facts contained therein, corrections, changes or additions bears my initials.

This state was completed at (Time) _____, on the _____ day of _____, 2004.

Joe Bahena
Signature of person giving statement

Witness: Robert Randall / Robert Randall
Print Name

Witness: _____ / _____
Print Name

CASE MANAGEMENT FILE

LSCAS 517

VICTIM Joseph Dewayne Boudreaux

OFFENSE Dist the Peace by Uncivil Language

DEFENDANT Ricky Fox

CO-DEFENDANTS

CASE NUMBER 05-000261

DATE OF OFFENSE 02-07-05 JURISDICTION

INVESTIGATIVE OFFICERS Off Cary

	Yes	No
Witness List	[ ]	[ ]
Witness Statement	[ ]	[ ]
Defendant(s) Statement	[ ]	[ ]
Offense/Wreck Report	[ ]	[ ]
Arrest Report	[ ]	[ ]
Supplemental Report(s)	[ ]	[ ]
Coroners Report	[ ]	[ ]
Toxicology Report	[ ]	[ ]
Supplement on Evidence	[ ]	[ ]
Evidence Technician Report	[ ]	[ ]
Photos	[ ]	[ ]
Grand Jury Summary	[ ]	[ ]
Other	[ ]	[ ]

COURT DISPOSITIONS

Preliminary Hearing

Grand Jury

Final Disposition

Law Enforcement Systems, Inc. • P.O. Box 1835 • Corsicana, Texas 75151-1835

[redacted]
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
05/07/2006		
JMM	Correspondence to Atty. Hart re: trial and deadlines	0.20
JMM	Call to Atty. Broussard re: availability for conference	0.20
JMM	E-mail to Andy Buisson re: current status and MSJ	0.30
JMM	Call to Andy Buisson re: information for MSJ	0.20
JMM	Received and reviewed motion for continuance by Billy Ray Vice	0.20
JMM	Revised request for extension of deadlines; submitted by ECF	0.40
12/30/2006		
JMM	Reviewed initial claims materials re: facts surrounding allegations set forth in petition filed by Ricky Fox for purposes of federal question jurisdiction	0.60
JBS	Returned Mr. Reibe's call re: new lawsuit; called Mr. Reibe re: new lawsuit, received and reviewed correspondence/petition from Mr. Reibe, called Mr. Reibe re: investigation	0.80
JBS	Letter to Mr. Broussard re: extension	0.20
01/03/2006		
JBS	Called District Attorney; called Ron Reibe; called Mayor Riggins (twice); traveled to Calcasieu Parish to conduct initial investigation; conference with District Attorneys Fry and Reggie; called Mr. Broussard re: extension and claim documentation; received two calls from Mr. Broussard; reviewed records at clerk of court's office; conference with Mr. Reibe; returned to office in Natchitoches	8.70
JBS	Received call from Mr. Reibe	0.20
01/04/2006		
JBS	Received call from Mr. Reibe re: defense issue	0.20
JBS	Received call from Mayor Riggins re: status	0.20
JBS	Called Mr. Vice's attorney	0.20
01/05/2006		
JBS	Received and reviewed correspondence from [redacted] RMI	0.20

EXHIBIT
D continued

Risk Management, Inc.

10/31/2007

ACCOUNT NO 4201-00
STATEMENT NO 1

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
01/06/2006		
JBS	Letter to Mr. Broussard re: additional extensions for other defendants	0.20
JBS	Letter to [redacted]; initial status report	0.50
JBS	Conference call with [redacted]	0.40
01/09/2006		
JMM	Reviewed petition and file material, research re: federal question jurisdiction with multiple defendants	1.20
JMM	Prepared notice of removal based of federal question with multiple defendants; prepared civil cover sheet	1.50
JBS	Conference call with [redacted]	0.30
01/10/2006		
JBS	Received call from Mr. Reibe re: other counsel	0.20
01/11/2006		
JBS	Returned Mr. Vice's call re: answer	0.20
01/13/2006		
JBS	Called Mr. Reibe re: Vice	0.20
01/17/2006		
JBS	Received call from Mr. Vice re: Mr. Hebert	0.20
01/18/2006		
JBS	Received call from [redacted] re: conference; letter to all defense counsel; letter to [redacted] conference	0.50
01/19/2006		
JBS	Received and reviewed correspondence/Kahao report re: Fox	0.20
01/23/2006		
JMM	Reviewed and prepared [redacted] removal to federal court	0.40
01/24/2006		
JBS	Participated in conference call with [redacted] defense counsel	0.40
01/25/2006		
JMM	Letter to Atty. Broussard re: filings for notice of removal	0.20
JMM	Letter to Atty. McKay, Atty. Hebert and Atty. Thomas	0.40
JMM	Prepared consent to removal for Arthur Phillips, Billy Ray Vice and Troy Cary	0.40
JMM	Legal research - requirements for consent of removal and necessity of consent in writing prior to 30 day period, reviewed Martinez vs Entergy Corporation, West Law #2661815	0.80
JMM	Revised notice of removal base on federal jurisdiction and revised civil cover sheet	0.50
JMM	Prepared notice to 14th JDC of removal, letter to clerk of court	0.40
JMM	Prepared electronic filing to clerk for western district with attachments	0.30

Risk Management, Inc.

ACCOUNT NO: 4201-00
STATEMENT NO: 1

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
01/26/2006		
JMM	Received and reviewed e-mail from Nancy Lundy re: notice of removal, [redacted]	0.20
JBS	Called Mr. Reibe re: removal	0.20
JBS	Prepared answer and request for notice	1.50
01/27/2006		
JBS	Letter to clerk of court	0.20
01/31/2006		
JBS	Called Mr. Reibe re: status	0.20
02/14/2006		
JMM	Received and reviewed answer on behalf of Arthur Phillips	0.20
JMM	Reviewed file including removal order and original petition; revised answer	1.20
JMM	Letter to Calcasieu Parish District Court re: state suit proceedings	0.20
02/17/2006		
JMM	Received and reviewed removal order; memo to file	0.20
02/20/2006		
JMM	Received and reviewed motion and order filed by Michael D. Hebert for Billy Ray Vice; memo to file	0.20
JMM	Prepared motion for extension of time and order on behalf of Town of Vinton	0.40
JMM	Received and reviewed answer submitted on behalf of Troy Carey	0.20
JBS	Called Mr. Reibe	0.20
02/21/2006		
JBS	Received call from Mr. Hebert re: extension	0.20
02/24/2006		
JMM	Received and reviewed answer filed by defendant, Troy Carey	0.20
02/28/2006		
JMM	Prepared notice of submission of state record; prepared certificate, submission by ECF	1.00
JMM	Revised answer and defenses; prepared submission for ECF	0.50
JMM	Letter to Atty. Broussard regarding answer and defenses as well as response to removal order	0.20
JMM	Revised response to removal order	0.40
03/01/2006		
JMM	Received and reviewed notice and service return re: Billy Ray Vice; call to Atty. Broussard	0.20
03/23/2006		
JBS	Returned Scott Thomas' call re [redacted]	0.20

Risk Management, Inc.

10/31/2007

ACCOUNT NO: 4201-00
STATEMENT NO: 1

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
03/24/2006		
JBS	Returned [redacted]	0.10
JBS	Received [redacted]	0.20
JBS	Letter to Mr. Reibe [redacted]	0.20
03/30/2006		
JBS	Called Mr. Reibe re: status	0.20
04/25/2006		
JMM	Received and reviewed scheduling conference order as well as standing pre-trial procedural order; memo to file	0.20
04/26/2006		
JBS	Received and reviewed correspondence/notice from clerk of court re: scheduling conference	0.20
JBS	Called Mr. Reibe	0.20
JBS	Letter to Mr. Reibe	0.20
JBS	Received and reviewed correspondence from clerk of court re: selection of magistrate vs. district judge	0.20
05/01/2006		
JBS	Called [redacted]	0.20
JMM	Reviewed file; e-mail to Paul Reggie with Calcasieu Parish District Attorney's office	0.40
05/02/2006		
JMM	Received and reviewed e-mail from ADA Paul Reggie regarding status of criminal proceedings on Billy Ray Vice	0.20
05/07/2006		
JBS	Prepared initial disclosures	1.40
JBS	Prepared plan of work	1.00
JBS	Letter to Mr. Broussard re: plan of work	0.20
05/08/2006		
JBS	Received and reviewed correspondence from Mr. Broussard re: conference	0.20
JMM	Received and reviewed facsimile from Atty. Broussard regarding scheduling conference; call to Atty. Broussard	0.20
05/09/2006		
JMM	Call to judicial administrator regarding status of consent to magistrate; prepared consent form; submitted consent from by ECF	0.30
05/10/2006		
JBS	Called Mr. Reibe re: scheduling conference	0.20
JBS	Returned Mr. Broussard's call re: scheduling conference	0.20
JMM	Reviewed file; e-mail to Paul Reggie regarding discovery of criminal file	0.20
05/11/2006		
JMM	Received and reviewed e-mail from Assistant District Attorney Paul	

Vinton, Town of adv Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
	Reggie regarding criminal proceedings; executed consent for magistrate; e-mail to ECF	0.30
JMM	Reviewed scheduling conference order; reviewed standing order by Judge Minaldi; prepared proposed Rule 26 discovery plan; letter to opposing counsel	1.40
05/12/2006		
JMM	Received call from Scott Thomas	0.20
JMM	Received and reviewed letter from Atty. Broussard regarding proposed discovery plan and scheduling conference	0.20
JMM	Received and reviewed initial disclosures by plaintiff	0.20
JBS	Returned Mr. Broussard's call re: discovery order	0.20
JBS	Received call from Mr. Broussard re: discovery	0.30
JBS	Called Mr. Reibe	0.20
JMM	Call to Atty. McKay and Atty. Broussard re: Rule 26 Discovery Plan	0.40
05/14/2006		
JBS	Received and reviewed correspondence from Mr. Broussard re: scheduling conference and related issues	0.20
05/15/2006		
JMM	Submitted proposed discovery plan	0.20
JMM	Received and reviewed initial disclosures from Arthur Phillips	0.20
JBS	Received and reviewed correspondence from Mr. Broussard	0.20
JMM	Letter to Atty. Broussard regarding proposed rule 26 discovery plan	0.20
05/16/2006		
JBS	Called Mr. Reibe	0.20
JBS	Received and reviewed initial disclosures re: Troy Cary	0.20
JBS	Received and reviewed initial disclosures re: Arthur Phillips	0.20
JBS	Received and reviewed correspondence and initial disclosures regarding Billy Ray Vice from Mr. Hebert	0.30
05/17/2006		
JMM	Received and reviewed facsimile from Atty. Broussard regarding issues for scheduling conference	0.20
JBS	Preparation for scheduling conference	0.90
05/18/2006		
JBS	Called Mr. Reibe re: investigation	0.20
JBS	Traveled to Lake Charles regarding investigation (pro-rated)	1.50
JBS	Participated in scheduling conference	0.40
05/19/2006		
JBS	Conference with Mr. Reibe	0.50
JBS	Reviewed records at courthouse	1.00
JBS	Returned to office (pro-rated)	1.50
05/22/2006		
JMM	Revised motion regarding pre-trial order; letter to Attys. Hebert, McCay, Thomas and Broussard	0.50

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
05/25/2006		
JMM	Received call from Terry McKay regarding scheduling order	0.20
JMM	Received and reviewed initial disclosures by Billy Ray Vice	0.20
05/26/2006		
JBS	Received call from Steve Broussard re: scheduling order	0.30
06/23/2006		
JBS	Called Mr. Reibe	0.20
07/17/2006		
JMM	Received and reviewed facsimile from Atty. Broussard; reviewed scheduling order	0.20
07/19/2006		
JMM	Received and reviewed letter from Mr. Broussard re: Town of Vinton for non-liability; call to Atty. Broussard	0.40
07/20/2006		
JBS	Returned Mayor Riggins' call	0.20
JBS	Preparation for conference with Mayor Riggins	1.00
JBS	Traveled to Vinton for conference with Mayor Riggins	3.00
JBS	Called Mr. Broussard	0.20
JBS	Called Mr. Broussard re: discovery	0.20
JBS	Called Mr. Reibe	0.20
07/21/2006		
JMM	Call to Calcasieu Criminal Division; call to Calcasieu District Attorney	0.30
JMM	Received and reviewed letter from Atty. Broussard	0.20
JBS	Conference with Mayor David Riggins, [redacted]	2.00
JBS	Returned to office	3.00
07/25/2006		
JMM	Received and reviewed letter from Atty. Broussard regarding discovery	0.20
JBS	Received and reviewed correspondence from Mr. Broussard re: depositions	0.20
07/31/2006		
JMM	Received and reviewed letter from Atty. Broussard regarding discovery; reviewed file	0.20
08/02/2006		
JBS	Returned [redacted] call [redacted]	0.40
JMM	Received and reviewed letter from Atty. Broussard regarding discovery; call to Atty. Broussard	0.20
08/04/2006		
JBS	Received call from Mr. Broussard re: liability issues	0.20

Risk Management, Inc.

ACCOUNT NO: 4201-00
STATEMENT NO: 1

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
08/14/2006		
JBS	Received and reviewed correspondence from Mr. Broussard re: liability issues	0.20
08/19/2006		
JBS	Research re: liability issues	2.50
08/20/2006		
JBS	Research regarding liability issues	1.90
JBS	Letter to Mr. Broussard re: liability issues	0.40
08/22/2006		
JBS	Called Ron Reibe	0.20
JBS	Received and reviewed correspondence from Mr. Reibe	0.20
09/11/2006		
JMM	Received and reviewed notice and subpoena on deposition regarding Arthur Phillips; memo to file; letter to Ron Reibe	0.30
09/25/2006		
JMM	Received call from Randy Hart regarding discovery	0.30
JMM	Returned call to Steve Broussard regarding Arthur Phillips	0.30
09/27/2006		
JMM	Received and reviewed facsimile from Atty. Broussard; facsimile to Atty. Broussard regarding deposition of Arthur Phillips and Trooper Peveto	0.20
10/09/2006		
JBS	Received and reviewed correspondence from Mr. Broussard re: vicarious liability	0.20
11/01/2006		
JBS	Called Mr. Reibe re: status	0.20
11/29/2006		
JMM	Received and reviewed facsimile from Atty. Broussard; letter to Atty. Broussard	0.20
12/08/2006		
JMM	Received and reviewed letter from Atty. Broussard re. discovery	0.20
12/27/2006		
JMM	Call to Atty. Broussard's office re: interrogatories	0.20
JMM	Received and reviewed letter from Atty. Broussard re: discovery	0.20
12/28/2006		
JMM	Received and reviewed e-mail from Atty Broussard's office re: discovery	0.20
01/05/2007		
JMM	Received and reviewed answers to interrogatories by Arthur Phillips	0.30

Risk Management, Inc.

10/31/2007

ACCOUNT NO: 4201-00

STATEMENT NO: 1

Vinton, Town of a/k/a Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
01/16/2007		
JBS	Returned Mr. Broussard's call re: vicarious liability	0.20
JBS	Received call from Mr. Steve Broussard re: legal issues	0.20
01/23/2007		
JBS	Received call from Mr. Broussard re: liability issue	0.20
01/25/2007		
JMM	Received and reviewed discovery responses by Billy Ray Vice	0.20
01/26/2007		
JMM	Received and reviewed letter from Atty. Broussard re: position of liability and mediation	0.20
02/01/2007		
JMM	Received and reviewed letter from Atty. Broussard re: discovery	0.20
02/02/2007		
JMM	Legal research - review of Roma Construction Company case re: liability of municipality for actions of official	0.40
02/06/2007		
JMM	Received and reviewed letter from Atty. Hebert re: discovery and mediation	0.20
02/14/2007		
JBS	Received call from Vinton City Attorney, Andy Busson re: status	0.40
JBS	Letter to Mr. Buisson re: status	0.20
JBS	Received and reviewed correspondence from Mr. Buisson re: status	0.20
02/20/2007		
JBS	Received call from Steve Broussard [redacted]	0.30
JBS	Called Mr. Thomas [redacted]	0.10
02/26/2007		
JMM	Legal research - review of liability of municipality for employee under 42 Section 1983 and case law in preparation for depositions of Troy Carey and Arthur Phillips	1.00
JMM	Reviewed petition and pleadings material; reviewed recent communication with Calcasieu D. A.; e-mail to Calcasieu D. A. re: status	0.40
02/27/2007		
JMM	Received and reviewed e-mail from Paul Reggie re: status of criminal proceedings	0.20
JMM	Call to Atty. Buisson re: information on claim for depositions	0.40
JMM	Legal research - review of cases cited by plaintiff for theory of municipal liability; reviewed standard cases for municipal liability	0.80
JMM	Prepared for depositions of Arthur Phillips, Troy Carey and Joe Sudwine	1.00
02/28/2007		
JMM	Travel to Lake Charles for depositions of Joe Sudwine and Arthur	

Risk Management, Inc.

10/31/2007
ACCOUNT NO 4201-00
STATEMENT NO 1

Vinton, Town of atty: Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
	Phillips; attended deposition of Joe Budwine; attended deposition of Arthur Phillips; returned to Natchitoches	11.20
JMM	Returned call to Atty. Buisson	0.20
JMM	Call to Atty. Buisson [redacted]	0.30
03/05/2007		
JMM	Received and reviewed letter from Atty. Minalc[redacted]	0.20
JMM	Reviewed hotdesk report re: Joe Budwine; reviewed statement; [redacted]	0.40
03/15/2007		
JMM	Letter to Atty. Buisson re: investigation	0.20
JMM	Call to Atty. Thomas re: issues of federal transcripts	0.20
03/19/2007		
JMM	Call to Atty. Buisson [redacted]	0.30
JMM	Reviewed [redacted]	1.00
03/27/2007		
JMM	Received call from Atty. Boussson re: discovery	0.20
04/02/2007		
JMM	Letter to all parties re: discovery	0.20
04/16/2007		
JMM	Received e-mail from Paul Reggie re: Billy Ray Vice criminal matter; e-mail to Mr. Reggie in response	0.20
04/17/2007		
JMM	E-mail to Paul Reggie re: criminal matter	0.20
04/23/2007		
JSS	Received and reviewed correspondence from Mr. Reibe re: Vice	0.20
JSS	Called Mr. Reibe re: Vice	0.20
JMM	Received and reviewed e-mail re: information on criminal trial of Billy Ray Vice	0.20
04/26/2007		
JMM	E-mail to Scott Thomas re: State Police CASE Report	0.20
JMM	Reviewed investigative materials re: vice investigation; report to Ron Reibe	2.00
JMM	Returned call to Atty. Thomas re: Billy Ray Vice	0.20
04/30/2007		
JMM	Call to Atty. Hart re: continuance	0.20
JMM	Prepared motion regarding continuance of trial and pre-trial deadlines with reasons; prepared order; prepared memorandum in support	0.60

Risk Management, Inc.

10/31/2007

ACCOUNT NO 4201-00
STATEMENT NO 1

Vinton, Town of adv. Fox, Ricky
RMI File No. 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
05/01/2007		
JBS	Returned call from Mr. Hart re. discovery	0.20
JBS	Received call from Mr. Hart and Mr. Broussard re: trial status	0.30
JMM	Received and reviewed e-mail from Scott Thomas re: continuance, revised motion for continuance	0.20
JMM	E-mail to Scott Thomas re: continuance, call to Atty. Hart	0.20
JMM	Received and reviewed e-mail from Scott Thomas re: Arthur Phillips, revised motion for continuance	0.20
05/02/2007		
JBS	Returned Mr. Hart's call re: discovery	0.20
JBS	Evaluated additional discovery needs	0.40
05/03/2007		
JMM	Prepared motion for extension of deadlines, prepared proposed order	0.80
JMM	Received call from Atty. Hebert to discuss status of continuance	0.20
JMM	Returned call to Atty. Hart re: MSJ	0.20
JMM	Call to Atty. Hebert re: continuance	0.20
JMM	Call to clerk of court re: criminal records on Billy Ray Vice, revised motion for continuance	0.40
JMM	Received and reviewed motion for summary judgment by plaintiff, Ricky Fox	0.30
JMM	Letter to Ron Reibe re: MSJ and status	0.20
JMM	Call to Atty. Hart re: discussion of extension of deadlines	0.30
05/04/2007		
JMM	Letter to Atty. Broussard re: continuance	0.20
JMM	Received call from Randall Hart re: MSJ and continuance	0.40
05/08/2007		
JMM	Received call from Debbie Nichols with Town of Vinton re: MSJ	0.30
JMM	Received and reviewed e-mail from Atty. Hart re: continuances, call to Judge Wilson's office re: continuance	0.30
JMM	Letter to Attys. Broussard, Hebert and Thomas re: conference on continuances	0.20
05/09/2007		
JMM	Reviewed pleadings in preparation for conference with Judge Wilson	0.40
JMM	Attended conference with Judge Wilson re: continuances and request for extensions	0.30
JMM	Call to Atty. Broussard following conference	0.20
JMM	Letter to all counsel re: depositions	0.20
JMM	Call to Atty. Ieyoub re: potential defense of Vice	0.20
05/10/2007		
JMM	Received and reviewed e-mail from Scott Thomas re: Troy Cary	0.20
JMM	E-mail to Scott Thomas re: information from Troy Cary, received and reviewed responsive e-mail	0.20
05/11/2007		
JMM	Received and reviewed deposition notice re: records deposition of A. G.	

Risk Management, Inc.

10/31/2007
ACCOUNT NO 4201-00
STATEMENT NO 1

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
	Butch Wilson: call to Butch Wilson	0.20
05/14/2007		
JMM	E-mail to Scott Thomas and Mike Hebert re: extension to respond to MSJ	0.20
JMM	Prepared subpoena for document production to Butch Wilson	0.30
JMM	Letter to Ron Reibe re: subpoena for Butch Wilson	0.20
JMM	Prepared motion for request of extension to respond to MSJ; prepared proposed order; submitted by EOF	0.60
05/15/2007		
JMM	Letter to Ron Reibe re: subpoena of records	0.20
05/16/2007		
JMM	Received and reviewed order re: extension of time to respond and judgment dismissing Arthur Phillips; memo to file	0.20
05/22/2007		
JMM	Received and reviewed correspondence from Atty. Broussard; e-mail to Atty. Thomas	0.20
05/24/2007		
JMM	Letter to Atty. Broussard re: discovery	0.20
05/31/2007		
JMM	Call to Atty. Wilkes re: his client's role in litigation	0.40
JMM	E-mail to Atty. Ieyoub re: discovery	0.20
06/04/2007		
JMM	Letter to all counsel re: depositions	0.20
06/06/2007		
JMM	Prepared notice of deposition re: Billy Ray Vice and Ricky Fox	0.20
06/07/2007		
JMM	Call to A. G.'s office re: discovery documents	0.20
JMM	Call to A. G.'s office re: document production	0.20
06/11/2007		
JMM	Call to Atty. Butch Wilson re: discovery documents	0.20
06/12/2007		
JMM	Received call from Atty. Wilke's office re: discovery materials	0.20
06/13/2007		
JMM	Received and reviewed correspondence and motions by plaintiff through Atty. Ieyoub	0.20
06/18/2007		
JMM	Call to Atty. Hart re: discovery	0.30
JMM	Call to Atty. Ieyoub and Atty. Wilkes re: Billy Ray Vice and discovery	0.40
JMM	Returned call to Atty. Broussard re: discovery	0.20

Risk Management, Inc.

10/31/2007

ACCOUNT NO: 4201-00
STATEMENT NO: 1

Vinton, Town of adv. Fox, Ricky
RM File No. 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
JMM	Received additional call from Chris Ieyoub's office re: discovery	0.20
06/22/2007		
JMM	Call to attorney general's office re: Billy Ray Vice documents	0.20
06/25/2007		
JMM	Received and reviewed correspondence from Atty. Broussard re: discovery	0.20
06/26/2007		
JMM	Received and reviewed petition for intervention by Shelter Insurance	0.20
06/27/2007		
JMM	Returned call to Atty. Butch Wilson; call to Ron Reiber; call to Butch Wilson	0.30
06/28/2007		
JMM	Returned call to Atty. Ieyoub re: production issue	0.20
06/29/2007		
JMM	Received and reviewed motion to produce evidence from state court	0.20
JMM	Received call from Atty. Hart re: production request	0.20
JMM	Received call from Atty. Ieyoub re: wire tape and status of depositions	0.30
JMM	Received call from Atty. Ieyoub and Harold Thibodeaux [redacted]	0.40
JMM	Call to Atty. Hart re: redacted procedure	0.20
JMM	Letter to counsel of record re: depositions	0.20
JMM	Received and reviewed records from AG office re: prosecution of Billy Ray Vice	1.50
JMM	Reviewed City Council meetings minutes for December - July, 2005 re: Billy Ray Vice	0.50
07/02/2007		
JMM	Travel to Lake Charles to Atty. Ieyoub's office for deposition meeting with Atty. Wilkes and Atty. Ieyoub [redacted] book deposition of Ricky Fox; meeting with Atty. Ieyoub [redacted]	9.20
07/03/2007		
JMM	Meeting at Atty. Ieyoub's office [redacted] reviewed criminal minute records available at Clerk of Court's office; JDC in Lake Charles; returned to Natchitoches	3.80
07/12/2007		
JMM	Received and reviewed letter from Atty. Broussard re: wire recordings and future depositions	0.20
JMM	Reviewed civil and criminal records for federal district courts in Louisiana for Ricky Fox; memo to file	0.40
JMM	Letter to Atty. Ieyoub re: civil suit findings	3.20
JMM	Prepared motion and order requesting extension to respond to MSJ; prepared proposed order	0.40

Risk Management, Inc.

10/31/2007

ACCOUNT NO: 4201-00

STATEMENT NO: 1

Vinton, Town of adv. Fox, Ricky
RMI File No: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

			HOURS
	JMM	Letter to Ron Reibe re: status	0.20
	JMM	Letter to Atty. Broussard re: extension to reply to MSJ	0.20
07/13/2007			
	JMM	Received and reviewed e-mail from Chris Ieyoub re: MSJ; e-mail in response	0.20
	JMM	Received and reviewed e-mail from Atty. Ieyoub re: motion for extension; e-mail in response	0.20
07/16/2007			
	JMM	Received and reviewed motion for extension by Atty. Ieyoub	0.20
07/17/2007			
	JMM	Received and reviewed e-mail re: order on extension for MSJ	0.20
07/23/2007			
	JMM	Received letter from Atty. Ieyoub re: Joe Budwine; memo to file	0.20
08/01/2007			
	JBS	Called Mr. Reibe re: status	0.20
	JMM	Received and reviewed fax from Atty. Broussard re: depositions; facsimile to Atty. Broussard	0.20
08/08/2007			
	JMM	Received and reviewed letter from Atty. Broussard re: discovery	0.20
	JMM	Received and reviewed fax from Atty. Broussard re: depositions; e-mail to Scott Thomas re: Troy Cary	0.20
08/10/2007			
	JMM	Received and reviewed motion by Shelter Mutual	0.20
	JMM	E-mail to Atty. Ieyoub re: motions	0.20
08/13/2007			
	JMM	Received and reviewed e-mail from Atty. Ieyoub; e-mail in response regarding MSJ	0.20
	JMM	E-mail to David Riggin[redacted]	0.20
	JMM	Call to B. B. Loyd, counc[redacted]	0.30
	JMM	Call to Janice Stinson [redacted]	0.20
	JMM	Legal research - reviewed Nichell case; review of 5th Circuit cases regarding law enforcement	2.50
08/14/2007			
	JMM	Received and reviewed letter from Atty. Broussard re: discovery	0.20
	JMM	E-mail to Atty. Ieyoub re: status of Mr. Vice and criminal appeal	0.20
	JMM	Received call from Atty. Hart re: MSJ	0.20
	JMM	Received call from Mayor Stinson [redacted]	0.20
	JMM	Call to Karen Douglas, [redacted]	0.30
	JMM	Received and reviewed [redacted] from Atty. Broussard re: Billy Ray Vice; e-mail to Chris Ieyoub re: criminal conviction; research - review of appeal for criminal conviction and timeliness	0.40
	JMM	Received and reviewed e-mail from Atty. Ieyoub re: appeal of criminal	

Risk Management, Inc.

10/31/2007

ACCOUNT NO 4201-00

STATEMENT NO 1

Vinton, Town of adv: Fox, Rabby
RMI File No : 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
	matter; e-mail in response	0.20
JMM	Call to Donald Dupree [redacted]	0.30
JMM	Returned call to Karen Douglas, [redacted]	0.20
JMM	Prepared affidavit for Kenneth Stinson [redacted]	0.50
JMM	Prepared affidavit for Karen Douglas [redacted]	0.20
JMM	Call to Debbie Nichols with City Hall [redacted]	0.20
JMM	Received and reviewed e-mail from Denise Prather re: sentencing minutes for Billy Ray Vice; reviewed sentencing minutes	0.20
JMM	Received and reviewed motion for extension filed by Billy Ray Vice	0.20
JMM	Prepared affidavit for William Loyd [redacted]	0.30
08/15/2007		
JBS	Participated in conference call with counsel	0.40
JMM	Call to Asst. D. A. Paul Reggie re: Billy Ray Vice criminal matter	0.20
JMM	Call to U. S. District Magistrate re: MSJ	0.20
JMM	E-mail to Atty. Ieyoub re: issues of MSJ and no final judgment	0.20
JMM	Received and reviewed e-mail from Atty. Ieyoub re: status of extension with plaintiff; e-mail in response to Atty. Ieyoub	0.20
JMM	Conference call with Atty. Ieyoub re: issues of pending deadlines, his client's criminal proceedings and opposition to plaintiff's MSJ, [redacted]	0.60
JMM	[redacted]	0.40
JMM	Received call from Atty. Wilkes re: discovery subsequent to status conference with Magistrate Wilson	0.20
JMM	Received call from council member, B. B. Loyd [redacted]	0.20
JMM	Call to Andy Buisson [redacted]	0.40
JMM	Call to Mayor Stinson to discuss affidavit	0.20
JMM	Received call from Karen Douglas [redacted]	0.30
JMM	Legal research - review of res judicata/collateral estoppel in regard to state criminal conviction in federal civil proceedings; reviewed issue of finality of judgment and appeal delays for state criminal proceeding; reviewed Section 1983 cases regarding "under color of law" reviewed cases regarding law enforcement actions outside of "color of law" on personal matters	4.50
08/16/2007		
JMM	E-mail to Atty. Ieyoub re: opposition memorandum as well as information from client	0.20
JMM	Received and reviewed correspondence from Atty. Ieyoub re: opposition to MSJ	0.20
JMM	Received and reviewed e-mail from Mayor David Riggins [redacted]	0.20
JMM	E-mail to Atty. Ieyoub re: opposition memorandum to MSJ	0.30
JMM	Received call from B. B. Loyd, [redacted]	0.20
08/17/2007		
JMM	Received call from Mayor Stinson [redacted]	

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
	[redacted]	0.40
JMM	Received and reviewed e-mail and proposed affidavit from Atty. Ieyoub regarding Atty. Thibodeaux; e-mail in response	0.20
JMM	Received call from Atty. Ieyoub [redacted]	0.30
08/20/2007		
JMM	Received and reviewed memorandum submitted by Billy Ray Vice in opposition to plaintiff's MSJ	0.40
JMM	Prepared additional portions of opposition memorandum regarding absence of liability on the Town of Vinton vase on lack of policy or custom; prepared section on offensive use of collateral estoppel	3.50
JMM	Legal research - review of cases regarding offensive use of collateral estoppel	0.60
JMM	Returned call to Atty. Ieyoub re: opposition memorandum	0.20
JMM	Prepared statement of material facts for Town of Vinton re: opposition	0.40
JMM	Returned call to Atty. Ieyoub re: opposition memorandum submitted by Vice	0.20
JMM	Letter to Ron Reibe re: opposition memorandum and status	0.20
JMM	Call to Mayor Stinson's office [redacted]	0.20
08/21/2007		
JMM	E-mail to Atty. Ieyoub [redacted]	0.20
JMM	Letter to Ron Reibe re: [redacted]	0.20
JMM	Call to Debbi Nichols with Town of Vinton [redacted]	0.30
JMM	[redacted] Broussard re: opposition to MSJ	0.20
JMM	[redacted] correspondence [redacted]	0.20
JMM	[redacted] for Town of Vinton [redacted]	0.80
08/22/2007		
JMM	Prepared answers to first set of interrogatories and requests for production	0.60
JMM	E-mail to Mayor Stinson [redacted]	0.20
JMM	Call to Atty. Broussard re: answers to discovery and current status of MSJ	0.30
JMM	Revised second set of interrogatories by plaintiff; correspondence to Mayor Stinson and Town Attorney Minaldi re: responses	0.40
JMM	Correspondence to Atty. Minaldi re: assistance for discovery and dispositive motions	0.20
JMM	Received and reviewed correspondence from Atty. Minaldi re: discovery; finalized answers to 1st unified discovery response	0.40
08/23/2007		
JMM	Call to Judge Wilson's office re: opposition memorandum; letter to Judge Wilson	0.30
08/27/2007		
JMM	Received and reviewed reply brief and correspondence from Atty.	

Risk Management, Inc.

10/31/2007

ACCOUNT NO 4201-00

STATEMENT NO 1

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
	Broussard	0.20
JMM	Letter to Ron Reibe re. status	0.20
08/29/2007		
JMM	Prepared additional argument in opposition memorandum regarding state law claims; revised opposition memorandum for final submission; revised statement of facts	1.50
JBS	Telephone conference with Mr. Reibe re: status	0.40
JMM	Received call from RMI re: status and response on settlement position	0.20
09/03/2007		
JMM	Reviewed state trooper narration of investigation; reviewed FBI statements and materials in regard to criminal prosecutin of Billy Ray Vice in preparation for depositions of Troy Cary and Billy Ray Vice	1.50
09/04/2007		
JBS	Telephone call with Mr. Reibe re: status	0.20
JMM	Call to Debbie with Town of Vinton; call to Atty. Teyoub re: discovery	0.20
JMM	Received and reviewed facsimile from Atty. Broussard re: deposition; call to Atty. Broussard	0.20
JMM	Travel to Lake Charles to Atty. Teyoub's offic[redacted]	4.70
JMM	Reviewed FBI wire recordings provided from criminal record with 14 JDC; made notes regarding preparation for deposition of Troy Cary and Billy Ray Vice	2.20
JMM	Prepared questions for deposition of Troy Cary	1.00
09/05/2007		
JMM	Meeting with Atty. Teyoub re: additional FBI wire recordings and transcripts, reviewed additional information provided[redacted]	0.80
JMM	Attended deposition of Troy Cary and meeting with Atty. Teyoub and Billy Ray Vice	4.80
JMM	Travel to Vinton; meeting with Mayor Stinson re: status and information for motions; return to Lake Charles	2.60
JMM	Call to Alderman[redacted]	0.40
JMM	Reviewed transcripts of wire recordings[redacted] preparation for deposition of Billy Ray Vice	1.40
JMM	Prepared questions and notes regarding deposition of Billy Ray Vice[redacted]	1.20
09/06/2007		
JMM	Meeting with Atty. Teyoub, Atty. Koenig[redacted]	1.00
JMM	Attended deposition of Billy Ray Vice	4.40
JMM	Return to Natchitoches from depositions in Lake Charles	2.50
09/07/2007		
JBS	Returned Mr. Reibe's call re: status	0.20
JMM	Received and reviewed facsimile from Atty. Broussard re: discovery	0.20

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured Town of Vinton
Date of Loss 01/31/05

		HOURS
JMM	Legal research - review of additional cases finding private action and not under color of law; reviewed cases regarding standing and lack of injury of lack of tracing causation to injury	3.80
09/10/2007		
JMM	Legal research - review of Section 1983 cases regarding elections and campaign issues	1.20
JMM	Reviewed insurance documents provided by Mark Hare with Town of Vinton; revised answers to discovery	0.40
JMM	Legal research - reviewed Section 1983 regarding lack of violation of federal rights regarding police investigation, police offense reports, police statements; reviewed cases finding no violation for damage to reputation and/or defamation	4.50
09/11/2007		
JMM	Call to Alderman, [redacted]	0.20
JMM	Legal research - reviewed Title 33 and Lawrason Act; reviewed Grant vs. Grace and Attorney General Opinions regarding final decision making authority for municipality for law enforcement; reviewed Monell lineage of cases including 5th Circuit cases and outside jurisdictional cases for determination of policy maker	3.00
09/12/2007		
JMM	Prepared motion for judgment on pleadings and motion for summary judgment and proposed orders; prepared memorandum in support of motion for judgment on pleadings regarding background information and pertinent allegations of petition; prepared law and argument regarding standards, color of law requirement, lack of standing, lack of constitutional violation for false offense report, damage to reputation and defamation	7.50
JMM	Prepared affidavit for Mayor Kenneth Stinson	0.50
JMM	Call to Mayor Stinson [redacted]	0.20
09/13/2007		
JBS	Research re: MSJ	1.50
JBS	Returned Mr. Reibe's call re: status	0.20
JMM	Received and reviewed letter from Atty. Ieyoub re: pre-trial issues	0.20
JMM	Continued memorandum in support regarding motion for judgment on the pleadings regarding vicarious liability of the municipality and application of Monell and Worsham; official capacity claims	2.50
JMM	Reviewed depositions of Billy Ray Vice, Ricky Fox, Arthur Phillips, Joe Budwine and Troy Cary in regard to citations for factual support for motion for summary judgment	6.00
JMM	Call to Mayor Stinson [redacted]	0.20
09/14/2007		
JMM	Prepared memorandum un support of motion for summary judgment in regard to lack of violation of federal rights; failure to prove anonymous letter; failure to prove orchestration of Budwine incident; color of law in regard to anonymous letter; vicarious liability in regard to the Lawrason Act and Monell in official capacity claims	8.50

Risk Management, Inc.

10/31/2007
ACCOUNT NO: 4201-00
STATEMENT NO: 1

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
JMM	Prepared statement of material facts in regard to motion for summary judgment	1.20
JMM	Received call from Mayor Stinson [redacted]	0.20
JMM	E-mail to Atty. Ieyoub and Atty. Thomas [redacted] Troy Cary and Billy Ray Vice	0.40
JMM	Returned call to Scott Thomas re: MSJ for Troy Cary	0.20
JMM	Made revisions to motion and memorandum [redacted]	0.40
09/17/2007		
JMM	Received and reviewed MSJ and memorandum submitted on behalf of Billy Ray Vice .	0.20
JMM	Received and reviewed discovery requests and motion	0.20
09/18/2007		
JMM	E-mail to Andy Buisson re: responses to written discovery	0.20
JMM	Reviewed deposition of Joseph Budwine; prepared summary	1.50
JMM	Reviewed deposition of Arthem Phillips; prepared summary	1.80
09/19/2007		
JMM	Reviewed depositions of Billy Ray Vice and Anthuso Phillips re: witnesses for trial; revised answers to discovery	0.30
JMM	Received call from Atty. Buisson [redacted] e-mail to Atty. Buisson in response	0.20
09/21/2007		
JMM	Call to Atty. Ieyoub re: Shelter's MSJ	0.20
JMM	Received and reviewed letter from Atty. Hart re: A. G.'s materials	0.20
JMM	Received call from Atty. Ieyoub re: upcoming trial and Shelter's MSJ	0.30
09/26/2007		
JMM	Received and reviewed e-mail from Scott Thomas re: scheduling order; reviewed file and standing order; e-mail in response	0.20
09/27/2007		
JMM	Reviewed electronic suit record regarding pending motions; reviewed regarding pre-trial preparation	0.40
09/28/2007		
JMM	Call to Andy Buisson re: propounded on Town of Vinton [redacted]	0.40
JMM	Prepared answers to second unified discovery requests by Fox	0.80
10/01/2007		
JMM	Received and reviewed opposition memorandum filed by Fox; e-mail to Atty. Thomas and Atty. Ieyoub	0.40
JMM	Received call from Atty. Ieyoub re: questions regarding MSJ	0.40
JMM	Reviewed opposition memorandum; letter to Ron Reibe regarding status	0.40
JMM	Revised report to Mr. Reibe re: evaluation	0.20
JMM	Received and reviewed e-mail from Atty. Ieyoub and Atty. Thomas re: MSJ	0.20
JMM	Received call from Atty. Ieyoub; received request for extension by Atty.	

Risk Management, Inc.

ACCOUNT NO: 4201-00
STATEMENT NO: 1

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS
	leyoub	0.20
10/02/2007		
JMM	Reviewed motion for summary judgment by Shelter Mutual; reviewed policy language	0.40
10/05/2007		
JMM	Returned call to Atty. Thomas to discuss status of litigation in regard to MSJ	0.50
JMM	E-mail to Atty. leyoub [redacted]	0.30
JMM	Received and reviewed letter from Atty. Wilkes re: plaintiff's request for remand and continuance	0.20
10/08/2007		
JMM	Received and reviewed e-mail from Atty. leyoub re: motions by plaintiff; e-mail in response	0.20
JMM	Conference call with Atty. Thomas and Atty. leyoub re: pending motions	0.40
JMM	Reviewed file materials; prepared status report to Mr. Reibe [redacted]	0.60
JMM	Reviewed testimony of Kenneth Delcambre; prepared summary	1.20
JMM	Revised status report to Ron Reibe	0.20
JMM	Correspondence to Atty. leyoub [redacted]	0.20
JMM	Letter to Atty. Hart re: opposition [redacted]	0.30
JMM	Correspondence to Atty. leyoub re: plaintiff's motions to remand and for continuance	0.20
JMM	Reviewed testimony of Joe Dumas and Ken Peveto regarding criminal trial; prepared summary	1.80
JMM	Received and reviewed additional correspondence from Atty. leyoub re: motion to remand, discovery issue	0.20
JMM	Legal research - extortion statute, sufficient evidence for specific intent of threat, whether anonymous letter considered extortion; reviewed cases	1.20
JMM	Legal research - Rule 8 and requirements for fact pleading, elements for proof of extortion in cases reviewing facts not supporting extortion, intentional infliction of emotional distress, defamation cases	3.00
10/09/2007		
JMM	Legal research - statutory immunity under 2798.1; review of additional cases regarding vicarious liability for intentional torts; reviewed cases with illegal acts, police intentional torts and assault and battery cases	1.50
JMM	Prepared reply memorandum regarding motion for summary judgment and motion for judgment on the pleadings regarding claims with anonymous letter	2.50
JMM	Reviewed depositions of Ricky Fox, Billy Ray Vice, Arthur Phillips, Troy Cary and testimony by Peveto, Duenas and Delcambre regarding facts to submit with reply memorandum; reviewed initial portion of Joe Budwine deposition	2.00
JMM	Prepared reply memorandum regarding claims associated with Joe Budwine incident; revised and finalized reply memorandum	3.20
JMM	Legal research - review of Section 1367 and cases finding federal court to maintain jurisdiction of state law claims; prepared motion and order for leave to file reply memorandum and request federal court maintain	

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

		HOURS	
	jurisdiction	1.20	
10/10/2007			
JMM	Received and reviewed opposition memorandum by Billy Ray Vice; reviewed policy language	0.40	
JMM	Received and reviewed motions by Troy Cary and Billy Ray Vice	0.20	
JMM	Prepared subpoena for personnel records from La. State Police Troop D; prepared records deposition notice	0.40	
JMM	Correspondence to Atty. Thomas and Atty. Ieyoub re: motion in limine	0.20	
JMM	Received and reviewed correspondence from Atty. Thomas re: motion in limine and witnesses and exhibits; correspondence in response	0.20	
JMM	Call to Atty. Ieyoub re: exhibit list and pre-trial statement	0.20	
JMM	Letter to Atty. Ieyoub re: subpoenas	0.20	
JMM	Letter to Mayor Stinson re: status of motions	0.30	
10/11/2007			
JMM	Received and reviewed e-mail from Atty. Thomas re: pre-trial statement; reviewed prior order by magistrate	0.20	
JMM	Received call from Judge Wilson's law clerk re: reply memorandum; correspondence to Atty. Ieyoub	0.30	
10/12/2007			
JMM	Received and reviewed motion to remand and motion to continue by plaintiff; reviewed notice of motion; reviewed over rule regarding motion referred to chambers	0.30	
JMM	Received and reviewed e-mail from Scott Thomas regarding motions filed by Fox; e-mail in response [redacted]	0.20	
JMM	Call to Mayor Stinson [redacted]	0.30	
JMM	Multiple e-mails to Scott Thomas and Atty. Ieyoub re: preparation of pre-trial statement and witness list	0.50	
JMM	Reviewed depositions of witnesses in regard to preparation of witness list in regard to preparation of witness list; prepared may call witness list	1.50	
JMM	Prepared exhibit list per scheduling order	0.60	
JMM	Legal research - research of evidentiary code regarding motions in limine for criminal conviction, other unrelated alleged acts of criminal conduct, authenticity	2.20	
JMM	Call to 14th JDC criminal records regarding Joseph Budwine	0.30	
JMM	Prepared pre-trial statement per court order	2.80	
JMM	Multiple correspondence to Atty. Ieyoub and Atty. Thomas regarding preparation of pre-trial statement and witness and exhibit list	0.60	
JMM	Call to B. B. Lloyd [redacted]	0.40	
	FOR CURRENT SERVICES RENDERED	273.90	0.00

RECAPITULATION

ATTORNEY	HOURS
Joseph B. Stamey	52.90
J. Mark Miller	221.00

Vinton, Town of adv. Fox, Ricky
RMI File No.: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

01/03/2006	Travel to and from Calcasieu Parish	169.75
01/03/2006	Long Distance Calls	8.40
01/26/2006	Court cost - Clerk of Court - U. S. District Court - paid our check #16062	250.00
02/28/2006	Court cost - Calcasieu Parish Clerk of Court - paid our check #16192	29.00
02/28/2006	Photocopies	5.10
02/28/2006	Postage	2.55
03/23/2006	Long Distance Call	2.80
04/26/2006	Miscellaneous cost - Pacer Service Center	13.44
05/08/2006	Long Distance Call	2.80
05/09/2006	Long Distance Call	2.80
05/10/2006	Long Distance Call	2.80
05/11/2006	Postage	1.11
05/12/2006	Long Distance Call	2.80
05/18/2006	Travel to Lake Charles (pro-rated)	66.75
07/19/2006	Long Distance Call	2.80
07/20/2006	Travel to Vinton	133.50
07/21/2006	Long Distance Calls	5.60
07/27/2006	Long Distance Calls	5.60
08/07/2006	Miscellaneous cost - Pacer Service - paid our check #16745	13 52
10/25/2006	Miscellaneous cost - Westlaw research	218 53
12/27/2006	Long Distance Call	2.80
02/26/2007	Long Distance Calls	5.60
02/28/2007	Travel - paid our check #17557	156.17
04/09/2007	Miscellaneous cost - Westlaw charges for 02/26/07	35.40
04/27/2007	Postage	1.59
04/30/2007	Long Distance Call	2.80
05/01/2007	Long Distance Call	2.80
05/02/2007	Long Distance Call	2.80
05/03/2007	Long Distance Calls	11.20
05/03/2007	Postage	1.35
05/07/2007	Long Distance Calls	5.60
05/09/2007	Long Distance Calls	5.60
05/11/2007	Long Distance Call	2.80
05/31/2007	Long Distance Call	2.80
06/06/2007	Postage	1.64
06/18/2007	Postage	1.64

EXHIBIT D Continued

Risk Management, Inc

10/29/2007

ACCOUNT NO 4201-00

STATEMENT NO 1

Vinton, Town of adv: Fox, Ricky
RMI File No: 254654
Insured: Town of Vinton
Date of Loss: 01/31/05

06/18/2007	Long Distance Calls	5.60
06/21/2007	Postage	2.05
06/27/2007	Long Distance Calls	5.60
07/02/2007	Travel to Lake Charles, return to Natchitoches - paid our check #18283	149.87
08/13/2007	Long Distance Calls	3.00
08/13/2007	Miscellaneous cost - online research	82.77
08/14/2007	Long Distance Calls	4.20
08/14/2007	Miscellaneous cost - online research	32.12
08/15/2007	Miscellaneous cost - online research	151.52
08/20/2007	Photocopies	19.60
08/20/2007	Postage	1.82
08/20/2007	Postage	1.65
08/20/2007	Long Distance Call	2.80
08/20/2007	Miscellaneous cost - online research	24.49
08/21/2007	Long Distance Call	1.80
08/21/2007	Miscellaneous cost - online research	2.71
08/22/2007	Long Distance Call	1.80
08/23/2007	Postage	3.29
09/04/2007	Long Distance Calls	5.60
09/10/2007	Postage	1.65
09/10/2007	Photocopies	10.80
09/12/2007	Long Distance Call	2.80
09/13/2007	Long Distance Call	2.80
09/14/2007	Long Distance Call	2.80
09/14/2007	Photocopies	33.20
09/17/2007	Postage	14.70
09/17/2007	Photocopies	99.40
09/21/2007	Miscellaneous cost - Plauche, Smith and Nieset - paid our check #18235	59.50
09/21/2007	Travel to Lake Charles and Vinton on 09/05/07 - total of 356 miles and two nights hotel accomodations - paid our check #18242	356.97
09/21/2007	Long Distance Call	2.80
09/25/2007	Deposition cost - Nat Dougel Ct. Rep. - CD's of exhibits - paid our check #18254	25.36
09/28/2007	Long Distance Call	2.80
09/30/2007	Deposition cost - Nat Dougel Court Reporter - Invoice #20070911-13-MIN - paid our check #18279	297.50
09/30/2007	Deposition cost - Nat Dougel Court Reporter - Invoice #20070911-17-MIN - paid our check #18280	272.85
10/08/2007	Postage	1.23
10/09/2007	Photocopies	17.60
10/10/2007	Long Distance Call	2.80
10/10/2007	Postage	1.82
10/10/2007	Postage	5.70
10/12/2007	Long Distance Calls	8.40
10/15/2007	Court cost - Calcasieu Parish Clerk of Court - paid our check 18335	12.00
10/16/2007	Postage	2.56
10/16/2007	Postage	1.54
10/17/2007	Postage	1.82
	TOTAL EXPENSES	2,906.03

PLAUCHE, SMITH & NIESET
1123 PITHON STREET
POST OFFICE DRAWER 1705
LAKE CHARLES, LA 70602-1705

Ph: 337-436-0522 Fax 337-436-9637

SHELTER INSURANCE COMPANY

1817 WEST BROADWAY
COLUMBIA, MISSOURI 65218-0001

August 3, 2007

File # 070514

Attention: VICKIE DAVIS

RE: RICKY FOX V. BILLY VICE, ARTHUR PHILLIPS, TROY CART & TOWN OF VINTON
CLAIM # 17-41-3389984-1-ZS
D/L JANUARY/2005
SUIT # 05-5932 / 14TH JDC

DATE	TASK	DESCRIPTION	HOURS	AMOUNT	ACCOD	LAWYER
May-04-07	L190	Conference with Shari Crespy regarding new suit assignment and particulars regarding same	0.30	31.50	A106	CPI
May-07-07	L190	Obtaining original suit record from the 14th JDC and review of Petition For Damages and comparison with pleadings previously obtained to ensure accuracy need for filing of responsive pleadings	0.70	73.50	A104	CPI
	L190	Correspondence from Shari Crespy confirming new suit assignment, details of coverage and defense being afforded to insured	0.10	10.50	A104	CPI
	L190	Correspondence from Company to Greg Wilkes, attorney for Shelter, regarding assignment of defense of Shelter	0.10	10.50	A106	CPI
	L210	Review of Citation and Petition For Damages filed by Ricky Fox in preparation for response to same and need for any immediate action and/or filing on behalf of insured	0.50	52.50	A104	CPI

	L330	Correspondence from Mark Miller, attorney for Town of Vinton, confirming scheduling of depositions of Ricky Fox and Billy Ray Vice and posting of same	0.10	10.50	A107	CPI
Jun-05-07	L330	Correspondence from Mark Miller, attorney for Town of Vinton, regarding Notice of Depositions	0.10	10.50	A107	CPI
Jun-06-07	L330	Review of Notice of Depositions of Ricky Fox and Billy Ray Vice and posting of same	0.20	21.00	A104	CPI
Jun-11-07	L190	Download of all pleadings from the Federal Court website and review of all documents including Motion for Summary Judgment filed on behalf of plaintiffs set for hearing, Answers on behalf of Billy Ray Vice and Town of Vinton, various pleadings filed in connection with removal, pretrial order, trial notices, etc. and detailed review for preparation of necessary responses	2.20	231.00	A104	CPI
	L190	Conference with Magistrate Wilson regarding enrollment, filing of various motions and issues relating to current pretrial deadlines	0.30	31.50	A108	CPI
	L190	Call to Greg Wilkes, attorney for Shelter, regarding upcoming discovery	0.10	10.50	A107	CPI
	L190	Conference with Judge Minaldi regarding extension of time to file responsive pleadings and confirming Billy Ray Vice will not be required to file his memorandum to the motion for summary judgment on 6/12/07	0.30	31.50	A107	CPI
	L210	Draft and revise of Motion to Substitute Counsel	0.40	42.00	A103	CPI
	L210	Draft and revise of Request for Extension on briefing of Motion for Summary Judgment	0.30	31.50	A103	CPI

	L330	Receipt of followup correspondence from Mark Miller regarding depositions of Ricky Fox and Billy Ray Vice	0.10	10.50	A107	CPI
	L330	Review of deposition notices and comparison with previous submissions to document all changes to name and posting of deposition details	0.20	21.00	A104	CPI
	L330	Correspondence to Billy Ray Vice advising of deposition particulars and mandating attendance	0.20	21.00	A106	CPI
Jun-13-07	L330	Conference with Billy Ray Vice advising of depositions	0.20	7.00	A106	JS
Jun-14-07	L190	Receipt of Notice from U.S. District Court regarding deficient document on motion for extension of time	0.10	10.50	A108	CPI
	L190	Receipt of Notice from U.S. District Court regarding Notice of Deficiency on motion to enroll	0.10	10.50	A108	CPI
Jun-19-07	L330	Conference with insured regarding postponement and rescheduling of deposition	0.10	10.50	A106	CPI
Jun-20-07	L190	Meeting with attorney for plaintiff regarding extension of time within which to file response to Motion for Summary Judgment, discussion of case facts, discussion of possible Motion for Summary Judgment on coverage, matters relating to position of cocounsel and issues regarding rescheduling of depositions and possible jail time for Mr. Vice based on recent sentencing	0.50	52.50	A107	CPI
Jun-21-07	L190	Receipt of correspondence from Federal Court evidencing filing of Motion to Substitute Counsel of Record and file recordation of same	0.10	10.50	A108	CPI

	L190	Receipt of separate correspondence from Federal Court evidencing filing of Motion for Extension of Time to Respond to Motion for Summary Judgment	0.10	10.50	A108	CPI
	L190	Meeting with plaintiff's attorney regarding Motion to Enroll, Motion for Extension of Time within which to Respond to Motion for Summary Judgment, elements of Motion for Summary Judgment, damage claim by plaintiffs and issues relating to coordination of discovery	0.40	42.00	A107	CPI
	L190	Receipt and review of conformed copy of Motion For Extension of Time to Response to Motion For Summary Judgment from U S District Court Clerk	0.10	10.50	A104	CPI
	L190	Receipt and review of conformed copy of Motion to Enroll from U S District Court Clerk	0.10	10.50	A104	CPI
	L190	Receipt and review of Order granting enrollment of counsel for Billy Ray Vice from U S. District Court Clerk	0.10	10.50	A104	CPI
Jun-22-07	L190	Correspondence from attorney for codefendant regarding transcribed depositions of Joe Budwine and Arthur Phillips	0.10	10.50	A107	CPI
	L190	Review and detailed study of previous transcribed deposition testimony of Joe Budwine including tab and highligh of important testimony as it relates to the defense of Billy Ray Fox	3.90	409.50	A104	CPI
Jun-23-07	L190	(Sat) Review and detailed study of transcribed deposition testimony of Arthur Phillips including 162 pages of testimony and tab and highlight of important testimony as it relates to defense of Billy Ray Vice	4.50	472.50	A104	CPI

Jun-24-07	L190	Receipt of email correspondence from USDC regarding Notice of Filing of Proposed Order/Judgment and file recordation of same	0.10	10.50	A108	CPI
	L190	Receipt of email correspondence from USDC regarding Notice of Filing of Motion to Withdraw and file recordation of same	0.10	10.50	A108	CPI
Jun-25-07	L110	Research of issue regarding objection to Ex Parte Motion for Production of Evidence	0.40	42.00	A102	CPI
	L190	Draft and revise of preliminary discovery plan based on review of testimony of Budwine and Phillips	0.30	31.50	A103	CPI
	L190	Letter to Attorney for co-defendant regarding deposition transcripts	0.20	21.00	A107	CPI
	L320	Receipt of correspondence from plaintiff's attorney regarding Ex Parte Motion for Production of Evidence from State Court regarding CD wire recording which were used in the criminal case against Billy Ray Vice	0.10	10.50	A107	CPI
	L320	Letter to all counsel regarding production of evidence in criminal court	0.20	21.00	A107	CPI
	L320	Receipt of correspondence from codefendant regarding additional discovery details	0.10	10.50	A107	CPI
	L330	Receipt of separate correspondence from attorney for Town of Vinton, Mark Miller regarding Re Notice of Deposition	0.10	10.50	A107	CPI
	L330	Review of new deposition notices and posting of new deposition particulars	0.20	21.00	A104	CPI
	L330	Letter to Company advising of new deposition dates	0.20	21.00	A106	CPI
Jun-26-07	L190	Receipt of correspondence from attorney for Sheltie regarding intervention as a defendant under Rule 24	0.10	10.50	A106	CPI

	L210	Review of intervention of Shelter Mutual Insurance Company	0.20	21.00	A104	CPI
	L210	Review of Motion to Intervene as defendant under Rule 24 with accompanying order	0.20	21.00	A104	CPI
	L210	Receipt and review of Motion of Andre Boisvert to Withdraw As Counsel for The Town of Vinton	0.10	10.50	A104	CPI
	L210	Receipt and review of Order from U.S. District Court granting motion to withdraw as counsel	0.10	10.50	A104	CPI
Jun-28-07	L190	Receipt of correspondence from U.S. District Court of Notification of filing of Motion to Intervene by Shelter	0.10	10.50	A108	CPI
	L190	Receipt of correspondence from the U.S. District Court regarding Order on Motion for Extension of Time to File Responsive Pleadings	0.10	10.50	A108	CPI
Jun-29-07	L110	Brief research regarding possible objections to production of FBI wire tape including any constitutional and 5th amendment rights that the claimant may have	1.00	105.00	A102	CPI
	L190	Conference with criminal attorney regarding 5th Amendment rights, objection to request for production of FBI tapes and matters relating to protection of insured's interests	0.50	52.50	A107	CPI
	L190	Conference with attorney Mack Miller advising of possibility of asserting 5th Amendment rights, requesting postponement of deposition and discussing joint objection to production of FBI tapes	0.30	31.50	A107	CPI
	L190	Correspondence to plaintiff's attorney regarding lack of objection to Federal Court order	0.10	10.50	A107	CPI

L190	Lengthy conference with Greg Wilkes regarding criminal transcript, disposition of criminal charges, upcoming depositions, sharing of information regarding trial transcript and matters relating to Shelter opposition to summary judgment	0.40	42.00	A107	CPI
L210	Receipt of correspondence from plaintiff's attorney enclosing Ex Parte Motion for Production of Evidence	0.10	10.50	A107	CPI
L210	Review of Ex Parte Motion for Production of Evidence from State Court Criminal Proceeding as well as Memorandum and Order filed in connection there with	0.40	42.00	A104	CPI
L320	Joint conference with attorney Mark Miller and criminal attorney, Harold Thibodeaux, concerning 5th Amendment rights of Billy Ray Vice, transcription of FBI tapes used in criminal proceeding, matters relating to postponement of deposition and issues concerning Federal Court order regarding production of criminal trial evidence	0.40	42.00	A107	CPI
L320	Receipt and preliminary review of 4 inch stack of documents including transcript of FBI wire tap recordings used at criminal trial	1.00	105.00	A104	CPI
L320	Followup conference with plaintiff's attorney demanding transcript of Fox testimony in criminal trial	0.20	21.00	A107	CPI
L330	Predeposition meeting with Billy Ray Vice beginning discussion of trial transcripts, FBI transcripts, deposition ground rules, matters relating to possible 5th Amendment rights	1.50	157.50	A106	CPI

	L330	Followup conference with Billy Ray Vice advising of cancellation of deposition, conference with plaintiff's attorney regarding no objection to Federal Court order producing criminal trial evidence in light of postponement of Vice deposition	0.30	31.50	A106	CPI
	L330	Third conference with Mr. Vice regarding predeposition meeting and additional ground rules for attendance in deposition without active participation	0.20	21.00	A106	CPI
	L330	Review of notes and outline from previous review of Phillips and Budwine depositions, review of all pleadings filed by plaintiff, including Motion For Summary Judgment, drafting of case specific deposition questions for Mr. Fox	3.00	315.00	A104	CPI
	L330	Receipt of correspondence from co-defendant regarding cancellation of deposition of Billy Ray Vice	0.10	10.50	A107	CPI
Jul-02-07	L330	Final preparation for deposition, predeposition meeting with Mr. Vice and update of deposition questions based on information obtained from Mr. Vice	0.80	84.00	A101	CPI
	L330	Attendance and participation in deposition of plaintiff, Ricky Fox	5.50	577.50	A109	CPI
Jul-03-07	L150	Draft and revise of Litigation Budget	0.80	83.00	A103	CPI
	L190	Draft and revise of detailed Litigation Plan with recommendations for handling	1.00	105.00	A103	CPI
	L190	Receipt of correspondence from the U. S. District Court of Notification of filing of Execution Searches Parte Motion for Production of Evidence filed by Ricky Fox	0.10	10.50	A108	CPI

	L210	Review of conformed filed Ex-Parte Motion for Production of Evidence From State Court and comparison with previous submission to ensure no changes or alterations were made to same	0.10	10.50	A104	CPI
	L330	Review of notes from deposition of plaintiff, Ricky Fox	0.50	52.50	A103	CPI
	L330	Draft and revise of detailed deposition summary of Ricky Fox	1.00	105.00	A103	CPI
Jul-09-07	L190	Receipt of correspondence from plaintiff's attorney regarding plaintiff's Second Unified Discovery Request	0.10	10.50	A107	CPI
	L190	Review of plaintiff's Second Unified Discovery Request to defendant, Town of Vinton and diary of file for appropriate delays for response	0.20	21.00	A104	CPI
Jul-12-07	L190	Receipt of correspondence from plaintiff's attorney regarding CD of FBI wire recordings of Billy Ray Vice	0.10	10.50	A107	CPI
	L190	Receipt of separate correspondence from plaintiff's attorney regarding discovery plan including efforts to locate and depose Troy Cary	0.20	21.00	A107	CPI
	L320	Letter to plaintiff's attorney requesting production of CD wire recordings	0.20	21.00	A107	CPI
Jul-13-07	L190	Correspondence from Mark Miller, attorney for Town of Vinton, regarding civil suits involving Ricky Fox and disclosure of same by Mr. Fox	0.30	31.50	A107	CPI
	L190	Correspondence to Mark Miller regarding retrieval of suit records regarding civil suit records	0.10	10.50	A107	CPI
	L110	Search USDC web site for information pertaining to civil and criminal records on plaintiff and print docket sheets	0.40	14.00	A102	DRP

	L190	Conferences with USDC Western District of LA archives division and Federal National Records Center on copies of civil & criminal records on plaintiff, Review of request forms pertaining to request	0.50	17.50	A108	DRP
	L190	Telephone conference with counsel, Mark Miller on federal criminal charges on plaintiff, Review of criminal docket sheet via e-mail from counsel, Mark Miller	0.30	10.50	A107	DRP
	L190	Letter to Federal National Records Center on copies of civil suit records on plaintiff	0.20	7.00	A108	DRP
Jul 15 07	L190	Review of information from 14th Judicial District Court regarding conviction of Joe Budwine for possession of cocaine and imposition of 5 year prison sentence	0.20	21.00	A104	CPI
	L190	Letter to Company advising of Budwine conviction	0.20	21.00	A106	CPI
	L190	Letter to all counsel providing updated information regarding Budwine conviction	0.20	21.00	A107	CPI
Jul-18-07	L190	Receipt of correspondence from attorney for Shelter on coverage issue regarding invocation of 5th Amendment Right	0.20	21.00	A106	CPI
	L190	Letter to Attorney Wilkes regarding 5th Amendment rights and deposition of Vice	0.20	21.00	A107	CPI
	L190	Letter to Vice's criminal attorney regarding deposition request and 5th Amendment rights	0.30	31.50	A107	CPI
	L190	Brief review of file and letter to plaintiff's attorney regarding joint discovery plan	0.20	21.00	A104	CPI
	L330	Conference with plaintiff's attorney regarding availability for deposition of Troy Cary	0.10	10.50	A107	CPI

Jul-18-07	L330	Receipt of follow up correspondence from plaintiff's attorney regarding additional deposition details	0.10	10.50	A107	CPI
Jul-26-07	L190	Receipt and review of correspondence from Clerk regarding request for copies of prior federal civil suits involving plaintiff from National Archives	0.10	10.50	A104	CPI

49.60

DISBURSEMENTS		Disbursements	Receipts
Jun-29-07	Outside printing COPIES DEP TRANSCRIPTS / FOX / JOSEPH V STAMEY 1 @ 51.75	51.75	
Jul-16-07	Outside printing COPY OF SUIT RCD/ LOUELLA BENSON V. RICKY FOX/ NATF 1 @ 35.00	35.00	
	Outside printing COPY OF SUIT RCD/ KENNETH DELCAMBRE V. RICKY FOX/ NATF 1 @ 35.00	35.00	
Jul-24-07	Outside printing #20070716I4VCD, DUPLICATE CDS/ RICKY FOX / NAT DOUGET CT RPR 1 @ 24.50	24.50	
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SHELTER INSURANCE COMPANY

1817 WEST BROADWAY,
COLUMBIA, MISSOURI 65218-0001

October 29, 2007

File #: 070514

Attention: VICKIE DAVIS

RE: RICKY FOX V. BILLY VICE, ARTHUR PHILLIPS, TROY CART & TOWN OF VINTON
CLAIM #37-41-3389984-1-ZS
D/L JANUARY/2005
SUIT # 05-5932 / 14TH JDC

DATE	TASK	DESCRIPTION	HOURS	AMOUNT	ACCDELAWYER
Aug-01-07	BW	Receipt of correspondence from plaintiff's attorney regarding deposition of Eric Vormaer	0.10	10.50	CPI
	BW	Letter to plaintiff's attorney regarding discovery plan	0.20	21.00	CPI
	BW	Receipt of correspondence from plaintiff's attorney regarding attempts to depose Billy Vice despite Fifth Amendment concerns	0.10	10.50	CPI
Aug-02-07	BW	Receipt of correspondence from Greg Wilkes regarding deposition of Troy Cary	0.10	10.50	CPI
Aug-05-07	BW	Receipt of correspondence from Court Reporter regarding errata sheet for deposition of Ricky Fox	0.10	10.50	CPI
	BW	Review of errata sheet in comparison with transcript to determine what changes were made to the transcript by plaintiff	0.30	31.50	CPI
Aug 06-07	BW	Receipt of correspondence from plaintiff's attorney regarding Notice of Deposition	0.10	10.50	CPI

EXHIBIT
Vice A. cwbn

USCA5 888

BEST AVAILABLE COPY

	BW	Review of deposition notice of Eric Coming and posting of same	0.10	10.50	CPI
	BW	Receipt of correspondence from Attorney for Shelter regarding opposition to Motion for Enlargement of Time within which Shelter may file a Motion for Summary Judgment	0.10	10.50	CPI
Aug-07-07	BW	Review of criminal sentencing procedure involving Mr. Vice for determination of actual charges imposed, sentencing guidelines and review for purposes of determining status of Fifth Amendment assertion of rights	0.50	52.50	CPI
	BW	Call to attorney Greg Wilkes regarding deposition of Mr. Vice	0.10	10.50	CPI
	BW	Review of article and court records regarding sentencing of Shelter insured Billy Ray Vice	0.50	52.50	CPI
	BW	Conference with Billy Ray Vice's criminal attorney regarding Fifth Amendment right in connection with civil deposition	0.30	31.50	CPI
	BW	Review of file for preparation of informal mediation conference and evaluation with Shelter attorney, Vickie Davis	0.50	52.50	CPI
	BW	Receipt of correspondence from plaintiff's attorney regarding federal court discovery plan as required by local rules	0.10	10.50	CPI
Aug-08-07	BW	Meeting with Shelter attorney, Vickie Davis [redacted]	0.50	52.50	CPI
	BW	Receipt and review of notice by the U.S. District Court of Motion For Extension of Time to file Motion For Summary Judgment filed by Shelter	0.10	10.50	CPI

Aug-09-07	BW	In person meeting with personal counsel for Billy Vice going over file and producing certain documents at the request of Mr. Vice for purposes of Vice opposition to Motion for Summary Judgment including review of Vice affidavit to insure no inconsistencies with defense of Vice on the merits of the claim	1.50	157.50	CPI
Aug-13-07	BW	Correspondence from the U.S. District Court regarding notice of Order granting Shelter's Motion For Extension of Time to File Motion For Summary Judgment	0.10	10.50	CPI
	BW	Correspondence from the U.S. District Court regarding filing by The Town of Vinton of a Motion For Extension of Discovery and Dispositive Motion Deadline and to Respond to Motion For Partial Summary Judgment filed by plaintiff	0.10	10.50	CPI
	BW	Review of Motion For Extension for determination of necessity for filing of same on behalf of Shelter's insured, Billy Ray Vice	0.20	21.00	CPI
	BW	Receipt of correspondence from USDC evidencing filing of Motion for Extension of Time and Dispositive Motions and Deadline to Respond to Motion for Summary Judgment	0.10	10.50	CPI
	BW	Receipt of separate correspondence from USDC forwarding filed copy of the Motion for Extension of Time and Dispositive Motions and Deadline to Respond to Motion for Summary Judgment	0.10	10.50	CPI

	BW	Receipt and review of notice from the U.S. District Court regarding filing of Motion For Extension of Discovery and Dispositive Motion Deadline and to Respond to MPSJ and calendar of new deadlines set for same	0.20	21.00	CPI
Aug 14 07	BW	Receipt of correspondence from Attorney Broussard regarding availability for deposition of Billy Ray Vice	0.10	10.50	CPI
	BW	Conference with Attorney Broussard regarding availability for deposition of Billy Ray Vice	0.10	10.50	CPI
	BW	Receipt of email correspondence from Attorney Miller regarding availability for deposition of Billy Ray Vice	0.10	10.50	CPI
	BW	Draft and revise of Motion For and Order of Extension of Time to extend Discovery Deadline and to File Response/Reply to Plaintiff's Motion For Summary Judgment	0.50	52.50	CPI
	BW	Beginning preparation of opposition to plaintiff's motion for partial summary judgment against Billy Ray Vice and The Town of Vinton on the issue of liability for extortion by review of plaintiff's statement of material facts; plaintiff's affidavit, plaintiff's memorandum in support of motion for summary judgment, various exhibits and attachments and by review and briefing of cases cited in support of plaintiff's position including Johnson v. Hypolite, McCullough v. Dauzat, Allen v. McCurry, Kostal v. Hanna, Rome Construction v. Rieste	5.50	577.50	CPI
	BW	Receipt of correspondence from USDC evidencing filing of Motion for Extension of Time to Respond by Billy Vice	0.10	10.50	CPI

	BW	Receipt of separate correspondence from USDC forwarding filed copy of Motion for Extension of Time to Respond by Billy Vice	0.10	10.50	CPI
	BW	Receipt of correspondence from plaintiff's attorney regarding federal court discovery plan as it relates to Billy Ray Vice	0.10	10.50	CPI
	BW	Receipt and review of certified minutes of criminal hearing regarding Billy Ray Vice	0.20	21.00	CPI
	BW	Search Calcasieu Parish criminal records on Billy Ray Vice for minutes of sentencing. Telephone conference with Calcasieu Parish Clerk of Court on certified copy of minutes of sentencing of Billy Ray Vice, Review, label, scan, e-mail and file same	0.50	17.50	DRP
Aug-15-03	BW	Conference with plaintiff's attorney regarding dispositive motion deadlines, deadlines for opposition brief to motion for summary judgment, lodging of objections by plaintiff's attorney to extension briefing deadline and discussion of Vice deposition	0.40	42.00	CPI
	BW	Correspondence from Mark Miller reporting Affidavit of Harold Thibodeaux, criminal attorney for Mr. Vice	0.20	21.00	CPI
	BW	Letter to Mr. Miller regarding collaborative effort on opposition brief, affidavit of Thibodeaux and conference with Judge Wilson	0.20	21.00	CPI
	BW	Conference with Judge Wilson concerning request for emergency status conference	0.20	21.00	CPI
	BW	Correspondence to Judge Wilson regarding emergency status conference	0.20	21.00	CPI

BW	Conference with Harold Thibodeaux, criminal attorney for Mr. Vice discussing wording of Thibodeaux Affidavit, waiver of Fifth Amendment rights of Vice in connection with deposition in civil proceeding and coordination of written authorization for deposition of Vice in civil proceeding	0.30	31.50	CPI
BW	Draft and revise of Affidavit of Harold Thibodeaux	0.40	42.00	CPI
BW	Conference with Greg Wilkes, attorney for Shelter regarding upcoming status conference, additional issues to be raised at status conference and consent to extension of dispositive motion deadline	0.20	21.00	CPI
BW	Conference with attorney for Troy Cary, Steve Thomas, regarding status conference and particulars relating thereto	0.20	21.00	CPI
BW	Followup correspondence from attorney Mark Miller regarding additional evidence needed in connection with Opposition to Motion For Partial Summary Judgment	0.20	21.00	CPI
BW	Followup phone conference with Mark Miller regarding federal court case law in connection with opposition brief	0.20	21.00	CPI
BW	Followup conference with plaintiff's attorney again requesting consent to extend briefing deadlines, dismission of upcoming status conference and completion of federal court discovery plan	0.20	21.00	CPI
BW	Attendance and participation in status conference with Judge Wilson and all parties wherein dispositive motion deadlines were extended as to all parties, extension for reply brief was granted and pretrial matters discussed	0.50	52.50	CPI

	BW	Followup conference with Greg Wilkes regarding change in discovery plan relative to Vice and coordination of remapping of federal court discovery plan based on communications with all counsel	0.20	21.00	CPI
	BW	Receipt of correspondence from Attorney Broussard regarding objection to continuance of deadline	0.10	10.50	CPI
	BW	Receipt of correspondence from Attorney Wilkes regarding federal court discovery plan as it relates to Billy Ray Vice	0.10	10.50	CPI
	BW	Receipt and review of notice from the U.S. District Court regarding Order by Judge Wilson regarding motions for extension filed by Billy Ray Vice and Town of Vinton and issuance of new deadlines for filing of opposition to Motion for Summary Judgment and calendar same	0.10	10.50	CPI
Aug-15-07	BW	Continued work on opposition to motion for partial summary judgment including review and briefing of U.S. Supreme Court case Parkane Hosiery Co. Inc. v Shore particularly relating to the issue of offensive collateral estoppel and discussion of first draft of opposition brief	4.50	472.50	CPI
	BW	Conference with insured, Billy Ray Vice, regarding affidavit, discussion of Opposition to Motion For Summary Judgment and issues relating to availability for deposition	0.40	42.00	CPI
	BW	Dictation of Affidavit for signature of Harold Thibodeaux in connection with Opposition to Motion For Partial Summary Judgment	0.50	52.50	CPI

	BW	Meeting with Mr. Thibodeaux to discuss Affidavit, making of final changes, dictation of final draft and execution of same	0.50	52.50	CPI
	BW	Receipt of correspondence from USDC evidencing filing of Order granting Motion for Extension of Time to File Response to Motion for Summary Judgment	0.10	10.50	CPI
	BW	Receipt of separate correspondence from USDC evidencing filing of Dispositive Motions setting and/or resetting discovery deadlines	0.10	10.50	CPI
Aug-17-07	BW	Additional research including review and briefing of 42 U.S.C. 1983, 42 U.S.C.S. Section 1983, [illegible] Anderson vs. Liberty Lobby, Inc.SA-R.S. 14:66, Reid vs. State Farm Mutual Auto. Insurance Co., Celotex Corp. vs. Catrett, Lawrence vs. Univ. of Tex. Med. Branch at Galveston, Celotex Corp., 477 U.S. at 325, Lawrence, 183 F.3d at 311, Matsushita Elec. Indus. Co. vs. Zenith Radio Corp., Wallace vs. Texas Tech. Univ., Little vs. Liquid Air Corp., Allen vs. McCurry, Bruster vs. Parish of Jefferson, State of Louisiana, Townsend vs. Moya, Harris vs. Rhodes, Townsend vs. Moya, Wagoner vs. Dyson	2.50	262.50	CPI
	BW	Draft and revise of draft No. 2 of Opposition to Motion For Summary Judgment	1.00	105.00	CPI
	BW	Meeting with Harold Thibodeaux to discuss Affidavit and letter and final execution of same including final revision of Affidavit based on suggested changes	0.50	52.50	CPI
	BW	Followup Conference with Mark Miller advising of changes to Affidavit, joint strategies regarding contested facts and matters relating to filing of brief	0.30	31.50	CPI

Aug 18-07	BW	Completion of third and final draft of Response to Motion For Summary Judgment	1.20	126.00	CPI
Aug-19-07	BW	Draft and revise of Contested Statement of Material Facts as required by Local Rule 56.2	0.50	52.50	CPI
Aug 20-07	BW	Receipt of correspondence from Randy Hart regarding video deposition of Billy Vice	0.10	10.50	CPI
	BW	Review of deposition notice and posting of same	0.10	10.50	CPI
	BW	Letter to Company advising of deposition particulars	0.10	10.50	CPI
	BW	Letter to Billy Ray Vice regarding change in deposition, confirmation of appearing without subpoena and details regarding predeposition meeting	0.20	21.00	CPI
	BW	Receipt of notice from the U.S. District Court of filing of Opposition to Motion for Summary Judgment by Town of Vinton	0.10	10.50	CPI
	BW	Review of conformed copy of Opposition to Motion for Summary Judgment by Town of Vinton and comparison with previous submission to ensure no changes or alterations were made to draft of same	0.20	21.00	CPI
Aug 22-07	BW	Receipt of email correspondence from USDC evidencing filing of Order granting Ex Parte Motion for Production of evidence from State Court and file regarding of same	0.10	10.50	CPI
	BW	Meeting with plaintiff's attorney to discuss reply to opposition to Motion For Summary Judgment, discussion of previous settlement discussions, update of settlement discussions including possibility of mediation in matters relating to federal court, offers of proof in conjunction with upcoming trial	0.50	52.50	CPI

	BW	Receipt of correspondence from plaintiff's attorney regarding change in discovery plan	0.10	10.50	CPI
	BW	Notice from U.S. District Court regarding Order by Judge Wilson granting Execution Searches Parte Motion For production of Evidence from State Court	0.10	10.50	CPI
Aug-23-07	BW	Receipt of correspondence from USDC evidencing filing of Vice's Memorandum in Opposition to Partial Motion for Summary Judgment and file recordation of same	0.10	10.50	CPI
	BW	Receipt of correspondence from USDC evidencing filing of Town of Vinton's Memorandum in Support Partial Motion for Summary Judgment and file recordation of same	0.10	10.50	CPI
Aug-27-07	BW	Correspondence from U.S. District Court regarding notice of Reply by plaintiff to Opposition to Motion for Summary Judgment	0.10	10.50	CPI
	BW	Review of Plaintiff's Reply Memorandum to Opposition by Town of Vinton and Billy Ray Vice to Partial Motion For Summary Judgment	0.30	31.50	CPI
	BW	Correspondence from Mark Miller, attorney for Town of Vinton, regarding Opposition Memorandum	0.10	10.50	CPI
	BW	Receipt of correspondence from plaintiff's attorney regarding request for mediation	0.10	10.50	CPI
	BW	Conference with plaintiff's attorney regarding opposition to Motion For Summary Judgment, Reply Brief by plaintiff and matters relating to mediation	0.30	31.50	CPI
	BW	Correspondence from plaintiff's attorney regarding Plaintiff's Reply to Opposition to Motion For Summary Judgement	0.10	10.50	CPI

	BW	Review of Reply Brief and evaluation for same	0.30	31.50	CPI
	BW	Updated report to Company	0.30	31.50	CPI
Aug-28-07	BW	Review of exerts from transcript of FBI recordings filed into evidence in criminal case	0.50	52.50	CPI
Aug-30-07	BW	Receipt of Rule 26(F) disclosures from Mark Miller including interview notes from the FBI, incident report on Budwine, FBI narratives and notes, excerpts from FBI interviews with various witnesses, personal notes of J C Stone, affidavits of various witnesses including Mayor Riggins	3.30	346.50	CPI
Aug-31-07	BW	Review of transcribed deposition testimony of Ricky Fox numbering 189 pages and review of transcript for accuracy of transcript and errata sheet as well as exhibit portfolio and in preparation for depositions of Troy Cary and Billy Vice	2.20	231.00	CPI
Sep-04-07	BW	Beginning preparation for deposition of Troy Cary and upcoming deposition of alleged insured, Billy Vice by review of hours of FBI recordings and notes concerning same	3.50	367.50	CPI
	BW	Meeting with attorney Mark Miller regarding joint defense strategies with Town of Vinton	0.50	52.50	CPI
	BW	Meeting with Billy Vice and Mark Miller to go over FBI recordings, go over previous trial testimony, discuss all aspects of the case and begin to prepare Vice for upcoming deposition	3.00	315.00	CPI
	BW	Receipt of correspondence from plaintiff's attorney regarding request for last minute change in deposition of Troy Cary	0.10	10.50	CPI

	BW	Review of follow up correspondence from plaintiff's attorney confirming change in Troy Cary deposition	0.10	10.50	CPI
	BW	Beginning review of file in preparation for deposition of Troy Cary, including review of Budwine deposition testimony, FBI interview notes, packet of material received from Vice	2.80	294.00	CPI
Sep-05-07	BW	Various telephone conferences with Attorney Wilkes and Lake Charles Reporting regarding whereabouts of deposition transcript of Ricky Fox	0.30	31.50	CPI
	BW	Continued preparation for Vice deposition including conference with plaintiff's attorney regarding demand for transcript of FBI tapes	0.30	31.50	CPI
	BW	Receipt of hand delivery of 113 pages of FBI transcript	2.50	262.50	CPI
	BW	Review of deposition for Arthur Phillips, select excerpts from the FBI wiretaps (as transcribed by Billy Ray Vice) and a brief meeting with Billy Vice and drafting of deposition questions all in preparation for the deposition of Troy Cary	1.80	189.00	CPI
	BW	Attendance and participation at the deposition of Troy Cary	4.00	420.00	MPK
	BW	Preparation of written summary of the deposition testimony given by Troy Cary for purposes of reporting to Shelter	1.20	126.00	MPK
Sep-06-07	BW	Second meeting with Billy Ray Vice regarding preparation for upcoming deposition, review of complete FBI wire tap transcripts with Mr. Vice to discuss deposition	1.50	157.50	CPI
	BW	Attendance and participation in deposition of Billy Ray Vice and post deposition meeting with Mr. Vice to discuss all aspects of testimony	5.50	577.50	CPI

Sep-07-07	BW	Receipt of email correspondence from USDC evidencing filing of Plaintiff's Reply Memorandum to Opposition by Town of Vinton and Billy Vice to Plaintiff's Partial Motion for Summary Judgment	0.10	10.50	CPI
	BW	Receipt of evidence of filing of Plaintiff's Reply Memorandum to Opposition by Town of Vinton and Billy Vide to Plaintiff's Partial Motion for Summary Judgment and file recordation of same	0.10	10.50	CPI
	BW	Review of notes from deposition of Bill Ray Vice and dictation of detailed deposition summary	1.50	157.50	CPI
	BW	Updated report to Company regarding deposition summary and new case developments	0.30	31.50	CPI
	BW	Letter to Mark Miller, Attorney for Codefendant, Town of Vinton, regarding final pretrial recommendations based on new information obtained in connection with Cary and Vice depositions	0.30	31.50	CPI
Sep-10-07	BW	Receipt of correspondence from plaintiff's attorney regarding FBI transcript tapes	0.10	10.50	CPI
	BW	Letter to co-defendants concerning reimbursement for FBI tape transcripts	0.20	21.00	CPI
Sep-12-07	BW	Receipt of correspondence from Nat Douget Reporting Services regarding deposition transcript of Troy Cary	0.10	10.50	CPI
	BW	Review of transcribed deposition testimony of Troy Cary for accuracy of transcript for preparation of errata sheet and comparison with deposition notes	0.80	84.00	CPI
	BW	Receipt of correspondence from Nat Douget Reporting Services regarding deposition transcript of Billy Ray Vice	0.10	10.50	CPI

	BW	Review of transcribed deposition testimony of Billy Ray Vice for accuracy of transcript for preparation of errata sheet and comparison with deposition notes	0.80	84.00	CPI
Sep-13-07	BW	Letter to Billy Ray Vice attaching original campaign information received at Vice deposition	0.10	10.50	CPI
Sep-14-07	BW	Correspondence from U.S. District Court regarding filing of Motion For Summary Judgment by Shelter	0.10	10.50	CPI
	BW	Review of Motion For Summary Judgment, Memorandum in Support of Motion For Summary Judgment and all exhibits attached thereto filed by Shelter	0.40	42.00	CPI
Sep-17-07	BW	Correspondence from the U.S. District Court regarding filing of Motion For Summary Judgment by the Town of Vinton	0.10	10.50	CPI
	BW	Correspondence from the U.S. District Court regarding Notice of Motion Setting without oral argument regarding Motion For Summary Judgment and file note regarding same	0.10	10.50	CPI
Sep-20-07	BW	Correspondence from the U.S. District Court regarding confirmation of filing of Motion For Summary Judgment of Billy Ray Vice.	0.10	10.50	CPI
	BW	Correspondence from the U.S. District Court regarding Notice of Motion Setting without oral argument regarding Motion For Summary Judgment of Billy Ray Vice	0.10	10.50	CPI
Sep-24-07	BW	Receipt of correspondence from Federal Judge regarding confirmation of certified filing of Motion for Summary Judgment and Memorandum in Support and review and filing of same	0.20	21.00	CPI

Sep-25-07	BW	Review of correspondence from Randal Hart enclosing supplemental request for production of documents including entire Attorney General File from State of Louisiana v. Billy Race Vice	0.10	10.50	CPI
	BW	Detailed study of hundreds of pages of FBI records, witness statements and Court filings in the State of Louisiana v. Billy Ray Vice lawsuit	3.50	367.50	CPI
Sep-27-07	BW	Review of new account of arrest of Kenyon Budwine, possible relative of Joseph Budwine on attempted murder charge, theft and robbery charges	0.30	31.50	CPI
Sep-28-07	BW	Review of correspondence from plaintiff's attorney regarding Motion to Compel Discovery	0.10	10.50	CPI
	BW	Review of Motion to Compel, Memorandum in Support and various exhibits and attachments as it relates to co defendant, Town of Vinton and consideration of appropriate response	0.40	42.00	CPI
	BW	Receipt of correspondence from plaintiff's attorney regarding Opposition to various Motions for Summary Judgment	0.10	10.50	CPI
	BW	Review and detailed study of plaintiff's memorandum in opposition to defendant's, Town of Vinton and Troy Cary's Motion for Summary Judgment on the pleadings and Motion for Summary Judgment and Defendant Vice's Motion for Summary Judgment including detailed study of cases cited therein as well as review of various exhibits and attachments including deposition testimony, trial transcripts and consideration of reply memorandum	3.50	367.50	CPI

	BW	Correspondence from U.S. District Court regarding Memorandum in Opposition to Motion For Summary Judgment filed by Ricky Fox	0.10	10.50	CPI
	BW	Correspondence from the U.S. District Court regarding Memorandum in Opposition to Motion for Summary Judgment file by Ricky Fox	0.10	10.50	CPI
	BW	Detailed review of Memorandum in Opposition to Motion For Summary Judgment, attachments thereto, and review of cases cited therein in support of same for determination for strategy and need for filing of response to same.	0.80	84.00	CPI
Oct-01-07	BW	Research [redacted]	1.20	126.00	CPI
	BW	Conference with Vickie Davis [redacted]	0.30	31.50	CPI
	BW	Correspondence from U.S. District Court regarding confirmation of filing of Motion for Extension of Time to File Response/Reply of Billy Ray Vice	0.10	10.50	CPI
Oct-02-07	BW	Conference with Mark Miller regarding reply to plaintiff's memorandum	0.30	31.50	CPI
	BW	Second conference with Mark Miller regarding extension for opposition on behalf of Mr. Vice	0.20	21.00	CPI
	BW	Conference with Scott Thomas regarding extension	0.20	21.00	CPI
	BW	Conference with Greg Wilkes regarding merits of Shelter motion and extension	0.20	21.00	CPI

	BW	Meeting with plaintiff's attorney regarding opposition to Shelter Motion for Summary Judgment, extension of filing deadlines and matters relating to possible remand	0.30	31.50	CPI
	BW	Follow up conference with plaintiff's attorney regarding final approval of extension of briefing deadline	0.20	21.00	CPI
	BW	In person meeting with personal attorney for Billy Vice regarding opposition to Motion for Summary Judgment	0.40	42.00	CPI
	BW	Dictation of letter to Mr. Vice reminding of limited defense	0.30	31.50	CPI
	BW	Meeting with Mr. Vice again reminding of limited defense and executing letter regarding same	0.50	52.50	CPI
Oct-03-07	BW	Conference with personal attorney for Billy Vice regarding various documentation in connection with Vice Opposition to Motion For Summary Judgment	0.40	42.00	CPI
	BW	Correspondence to plaintiff's attorney producing documents voluntarily after identification of appropriate production items	0.30	31.50	CPI
	BW	Correspondence from U.S. District Court regarding Order granting Motion for Extension of Time to File Reply by Billy Ray Vice	0.10	10.50	CPI
	BW	Review of Order granting Motion for Extension and file note and calendar of deadline to respond as set by the Court	0.20	21.00	CPI
Oct-04-07	BW	Receipt of correspondence from plaintiff's attorney regarding possible continuance and motion to remand	0.10	10.50	CPI
	BW	Conference with plaintiff's attorney regarding continuance and motion to remand	0.20	21.00	CPI

	BW	Conference with co-defendants regarding continuance and motion to remand of plaintiff	0.20	21.00	CPI
	BW	Receipt of correspondence from plaintiff's attorney regarding remand issue and continuance	0.20	21.00	CPI
Oct-05-07	BW	Receipt of correspondence from Greg Wilkes regarding objection to motion to remand and information regarding continuance	0.10	10.50	CPI
	BW	Correspondence from Mark Miller, attorney for Town of Vinton, regarding case strategy in addressing the recent indications made by plaintiff's attorney, Randall Hart, that he would be filing a Motion to Remand and Motion to Continue Trial and discussions of possible filing of opposition to same	0.20	21.00	CPI
	BW	Correspondence from Scott Thomas, attorney for Troy Cary, regarding indications by plaintiff's attorney of filing of Motion to Remand and/or Motion to Continue Trial	0.10	10.50	CPI
Oct-08-07	BW	Joint meeting with Scott Thomas and Mark Miller regarding joint defense decision concerning opposing remand request and discussion of continuance opposition as well as detailed discussion of joint reply in response to plaintiff's opposition	0.40	42.00	CPI
	BW	Receipt of correspondence from Mark Miller regarding objection to remand and continuance	0.20	21.00	CPI
	BW	Correspondence from Mark Miller, attorney for Town of Vinton, regarding defamation claims, obtaining personnel file of Ricky Fox and issuance of subpoenas for same	0.20	21.00	CPI

	BW	Followup correspondence from Mark Miller, attorney for Town of Vinton, regarding objection to Motion to Remand and Motion to Continue Trial	0.20	21.00	CPT
	BW	Correspondence from Scott Thomas, attorney for defendant, Troy Cary to Randall Hart, attorney for plaintiff, regarding remand and continuance and prematurity of same in light of pending motions and addressing opposition to same	0.10	10.50	CPT
	BW	Correspondence to Randall Hart, attorney for plaintiff addressing opposition to motion to remand and continuance of trial	0.10	10.50	CPT
Oct-09-07	BW	Receipt of email correspondence from Attorney Hart regarding Attorney Miller opposition to Motion for Summary Judgment and file-recordation of same	0.10	10.50	CPT
	BW	In person meeting with personal counsel for Billy Vice going over file and producing certain documents at the request of Mr. Vice for purposes of Vice Opposition to Motion for Summary Judgment including review of Vice affidavit to ensure no inconsistencies with defense of Vice on the merits of the claim	1.50	157.50	CPT
	BW	Conference with plaintiff's attorney, Steve Broussard regarding response to reply brief of Town of Vinton and discussion of remand issues, upcoming trial date and request for extension for reply	0.50	52.50	CPT
	BW	Correspondence from Mark Miller, attorney for Town of Vinton, regarding draft of Reply Memorandum	0.20	21.00	CPT

	BW	Review of draft of Reply Memorandum being filed by Town of Vinton and detailed study for purposes of adopting portions of same on behalf of Billy Ray Vice	0.80	84.00	CPI
	BW	Correspondence from U.S. District Court regarding Motion For Leave to File Reply Memorandum filed by The Town of Vinton	0.10	10.50	CPI
	BW	Detailed review of lengthy Motion and Reply Memorandum in Support of of same along with numerous attachments filed by the Town of Vinton to Ricky Fox's Opposition to Motion For Summary Judgment	1.00	105.00	CPI
Oct-10-07	BW	Receipt of correspondence from Attorney Miller regarding deadline for Motion in Limine	0.10	10.50	CPI
	BW	Correspondence from the U.S. District Court confirming filing of Motion For Leave to File a Reply Memorandum and Memorandums In Support of Reply Brief filed by defendant, Troy Cary	0.10	10.50	CPI
	BW	Detailed review of Motion and Reply Memorandum in Support filed by defendant, Troy Cary.	0.50	52.50	CPI
	BW	Correspondence from the U.S. District Court confirming filing of Motion For Leave to File Reply Brief by Billy Ray Vice	0.10	10.50	CPI
	BW	Correspondence from the U.S. District Court regarding Notice of Deficiency to Motion and Order to Enroll by Gregory Marceaux, as attorney for Billy Ray Vice	0.10	10.50	CPI
	BW	Review of Motion For and Order to Enroll as additional counsel of record for Billy Ray Vice filed by Gregory P. Marceaux	0.20	21.00	CPI
	BW	Correspondence from Mark Miller, attorney for Town of Vinton, regarding submission of Motion in Limine	0.10	10.50	CPI

	BW	Correspondence to Mike Miller regarding issues to be addressed in Motion in Limine	0.10	10.50	CPI
Oct-11-07	BW	Correspondence from the U.S. District Court regarding Motion to Remand or Alternatively Motion to Continue Trial with Opposition filed by plaintiff, Ricky Fox	0.10	10.50	CPI
	BW	Review of Motion to Remand or Alternatively Motion to Continue trial filed by Ricky Fox and determination for strategy and possible need for filing of opposition to same	0.30	31.50	CPI
	BW	Correspondence from the U.S. District Court regarding Notice of Motion Referred to Chambers due to trial setting	0.10	10.50	CPI
Oct-12-07	BW	Conference with Billy Ray Vice regarding validity of allegations contained in Extortion letter to Ricky Fox	0.10	10.50	CPI
	BW	Email correspondence to Attorney Miller regarding Vice knowledge of validity of allegations contained in extortion letter	0.10	10.50	CPI
	BW	Receipt of correspondence from Attorney Thomas regarding preparation of witness and exhibits lists	0.10	10.50	CPI
	BW	Receipt of correspondence from Attorney Miller regarding Motion in Limine and Pretrial Statement including possibility of excluding the conviction of extortion	0.10	10.50	CPI
	BW	Receipt of separate correspondence from Attorney Thomas regarding various issues discussed with Judge Wilson	0.10	10.50	CPI
	BW	Receipt of separate correspondence from Attorney Thomas regarding possible objection to continuance, deadline of pretrial statement and opportunity to Motion for Remand	0.10	10.50	CPI

	BW	Receipt of correspondence from attorney for Town of Vinton regarding remand issues	0.10	10.50	CPI
	BW	Correspondence from the U.S. District Court regarding Pretrial Statement filed by defendant, The Town of Vinton	0.10	10.50	CPI
	BW	Detailed review of Pretrial Statement filed by defendant, The Town of Vinton	0.40	42.00	CPI
	BW	Correspondence from the U.S. District Court regarding Exhibit List filed by defendant, The Town of Vinton	0.10	10.50	CPI
	BW	Review of Exhibit List filed by defendant, The Town of Vinton	0.30	31.50	CPI
	BW	Correspondence from Mark Miller, attorney for Town of Vinton, regarding draft of may call witness and exhibit list	0.10	10.50	CPI
	BW	Review of draft of may call witness and exhibit list proposed by Mark Miller, attorney for Town of Vinton	0.40	42.00	CPI
	BW	Correspondence to Mark Miller, attorney for Mark Miller, addressing additional witnesses that may be included in witness and exhibit list filed on behalf of Billy Ray Vice	0.30	31.50	CPI
	BW	Correspondence from Mark Miller, attorney for Town of Vinton, regarding second draft of proposed Pretrial Report, Witness List and Exhibit List	0.10	10.50	CPI
	BW	Review of second draft of proposed Pretrial Report, Witness List and Exhibit List to be filed by Town of Vinton	0.30	31.50	CPI

	BW	Correspondence from Scott Thomas, attorney for Troy Cary, providing additional suggested witnesses and exhibits that he may included the Pretrial Report, Witness List and Exhibit List he intends to file on behalf of Troy Cary	0.20	21.00	CPI
	BW	Follow-up correspondence from Scott Thomas, attorney for Troy Cary, forwarding initial draft of "may call" witnesses and exhibit list	0.10	10.50	CPI
	BW	Correspondence from Mark Miller, attorney for Town of Vinton, regarding possible filing of joint Motion in Limine	0.10	10.50	CPI
Oct-15-02	BW	Draft and review of Pretrial Stipulation in compliance Pretrial Scheduling Order	1.50	157.50	CPI
	BW	Draft and revise of May Call Witness List in compliance with Pretrial Scheduling Order	0.60	63.00	CPI
	BW	Draft and revise of Exhibit List in compliance with Pretrial Scheduling Order	0.50	52.50	CPI
	BW	Receipt of correspondence from plaintiff's attorney enclosing Motion to Remand or Alternatively Motion to Continue	0.10	10.50	CPI
	BW	Review of Motion and Order and Memorandum in Support of Remand and Continuance and consideration of filing opposition thereto	0.50	52.50	CPI
	BW	Correspondence from the U.S. District Court regarding Order granting Motion for Leave to File Reply to the Town of Vinton	0.10	10.50	CPI
	BW	Correspondence from the U.S. District Court regarding filing of Reply Memorandum by the Town of Vinton to plaintiff's Opposition to Motion For Summary Judgment	0.10	10.50	CPI

BW	Correspondence from the U.S. District Court regarding filing of Reply Brief of Defendant, Troy Cary, to the plaintiff's Opposition to Motion For Summary Judgment	0.10	10.50	CPI
BW	Review of Reply Brief of Defendant, Troy Cary, to Opposition of Motion For Summary Judgment filed by Rocky Fox	0.30	31.50	CPI
BW	Correspondence from the U.S. District Court regarding confirmation of filing of Reply Brief of Defendant, Billy Ray Vice	0.10	10.50	CPI
BW	Correspondence to all parties herein forwarding Witness List on Billy Ray Vice in compliance with Pretrial Scheduling Order issued by the Court	0.20	21.00	CPI
BW	Correspondence to Mark Miller, attorney for Town of Vinton and Scott Thomas, attorney for Troy Cary, regarding draft of Motion and Limine	0.10	10.50	CPI
BW	Correspondence from Mark Miller address issues to be considered including in Motion in Limine	0.10	10.50	CPI
BW	Correspondence from the U.S. District Court confirming filing of Pretrial Statement of Billy Ray Vice	0.10	10.50	CPI
BW	Correspondence from the U.S. District Court confirming filing of Exhibit List of Billy Ray Vice	0.10	10.50	CPI
BW	Correspondence from the U.S. District Court confirming filing of Motion in Limine and Memorandum in Support thereof filed by Billy Ray Vice	0.10	10.50	CPI
BW	Correspondence from the U.S. District Court regarding Motion in Limine filed by Town of Vinton	0.10	10.50	CPI

	BW	Review of Motion in Limine and Memorandum In Support and exhibits thereto and comparison with previous submissions to determine if any changes or alterations were made to same	0.30	31.50	CPI
	BW	Correspondence from the U.S. District Court regarding Amended Exhibit Listed filed by the Town of Vinton	0.10	10.50	CPI
	BW	Review of Amended Exhibit List by Town of Vinton	0.20	21.00	CPI
	BW	Receipt of correspondence from co-counsel for Billy Vice regarding Memorandum in Opposition	0.10	10.50	CPI
	BW	Review of Memorandum in Opposition to Motion for Summary Judgment filed by Billy Ray Vice along with Memorandum in Support and Affidavit	0.40	42.00	CPI
	BW	Conference with attorney for Town of Vinton regarding suggestive changes to Motion in Limine	0.30	31.50	CPI
	BW	Review of email correspondence from attorney for Town of Vinton, supplemental research under federal evidence 609 and dictation of redraft of Motion in Limine	0.80	84.00	CPI
Oct-16-07	BW	Conference with plaintiff's attorney opposing Motion in Limine, discussing request for additional time to file opposition thereto and matters relating to possible case resolution	0.30	31.50	CPI
	BW	Correspondence from U.S. District Court regarding Notice of Motion Referred to Chambers	0.10	10.50	CPI
	BW	Review of Notice of Motion Referred to Chambers regarding the Motions in Limine and Memorandum in Support filed by defendants herein	0.20	21.00	CPI

Oct-17-07	BW	Correspondence from the U.S. District Court regarding Memorandum Ruling on Motions For Summary Judgment and Motion to Remand	0.10	10.50	CPI
	BW	Detailed review of Memorandum Ruling of Judge Methvin regarding Motions For Summary Judgment, Opposition to Motions for Summary Judgment, Reply Briefs, and Motion to Remand filed by plaintiff wherein federal claims against defendants were dismissed and case remanded to State Court	0.50	52.50	CPI
	BW	Correspondence from U.S. District Court regarding Judgment for Reasons as stated in Memorandum Ruling	0.10	10.50	CPI
	BW	Review of Judgment	0.20	21.00	CPI
	BW	Correspondence from the U.S. District Court regarding Notice of Remand issued herein	0.10	10.50	CPI
	BW	Review of Notice of Remand and file note regarding same	0.20	21.00	CPI
	BW	Correspondence from the U.S. District Court regarding Motion for Gregory P. Marceaux to enroll as Counsel for Billy Ray Vice	0.10	10.50	CPI
	BW	Review of Motion to Enroll and comparision with previous submission	0.20	21.00	CPI
	BW	Receipt of correspondence from Attorney Marceaux regarding Motion to Enroll as Counsel	0.10	10.50	CPI
	BW	Review of Motion to Enroll, accompanying order all for federal court approval and filing	0.10	10.50	CPI
Oct-18-07	BW	Correspondence to Vickie Davis advising of Notice of Remand and Memorandum Ruling issued by Judge Methvin regarding same	0.20	21.00	CPI

	BW	Receipt of correspondence from Attorney Thomas regarding various issues including Vice deposition, Cary deposition and Motion in Limine	0.10	10.50	CPI
Oct-30-07	BW	(Sat) Receipt of correspondence from Attorney for Town of Vinton regarding Notice of Deposition	0.10	10.50	CPI
	BW	Review of deposition notice and posting of same	0.20	21.00	CPI
	Totals			107.00	

DISBURSEMENTS		Disbursements	Receipts
Aug-15-07	Court Fees CERT CRIM RCDS BILLY RAY VICE / RICKY FOX / CLERK OF COURT 1 @ 6.00	6.00	
Sep-06-07	Meals LUNCH / FOX / ROLY POLY SANDWICH TRAY 1 @ 76.19	76.19	
Sep-13-07	Other MEDS/ FBI TRANSCRIPTS / RICKY FOX/ BROUSSARD & HART 1 @ 178.50	178.50	
	Totals	$260.69	$0.00

PETITIONER'S BRIEF

Supreme Court, US
FILED
DEC 23 2010
OFFICE OF THE CLERK

No. 10-114

IN THE

Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton, and TOWN OF VINTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

42 U.S.C. § 1988 authorizes courts to award reasonable attorneys' fees to prevailing parties in civil rights litigation. This Court has held that when the defendant is the prevailing party, fees may not be awarded unless the plaintiff's action was vexatious, frivolous, or brought to harass or embarrass the defendant. Petitioner Ricky D. Fox filed a lawsuit alleging various state common law torts, as well as a federal civil rights claim arising from the same facts. He voluntarily dismissed his civil rights claim and continued to litigate his state tort claims. A magistrate ordered him to pay all attorneys' fees incurred by Defendants for the three-year life span of the case. The questions presented are:

1. May a court award attorneys' fees to a defendant under § 1988 based on a voluntary dismissal of one claim in an action where the defendants must still defend against non-frivolous claims that are factually intertwined?

2. May a court award defendants all of the attorneys' fees they incurred in an action under § 1988 without any effort to isolate the fees attributable to the single dismissed claim?

PARTIES TO THE PROCEEDINGS BELOW

Respondent Billy Ray Vice, who was sued in both his official and his individual capacities, passed away on August 26, 2010, during the pendency of this action. His name remains in the caption because no representative has come forward as yet to substitute as a party in either capacity. Whether or not a party enters the case to substitute, this case remains alive because Petitioner still owes fees to the Town of Vinton.

Troy Cary, a Defendant in the underlying case, was not granted fees because he failed to present any evidence of attorneys' fees incurred. He did not appear before the court of appeals. His name has therefore been removed from the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 3

STATEMENT OF FACTS 5

Police Chief Vice Launches a Criminal Plot to Interfere with Mr. Fox's Run for Public Office 5

Mr. Fox Is Elected Police Chief, While Chief Vice Is Convicted 13

Mr. Fox Sues the Perpetrators and the Town in State Court 14

Defendants Remove to Federal Court and Proceed with Discovery 15

Counsel Withdraws Mr. Fox's Federal Claim, and the Magistrate Awards Full Attorneys' Fees 16

A Split Panel of the Court of Appeals Affirms 18

SUMMARY OF ARGUMENT 20

ARGUMENT 26

I. THE MAGISTRATE ERRED IN AWARDING ANY ATTORNEYS' FEES AGAINST MR. FOX FOR A DISMISSED FEDERAL CLAIM THAT WAS FACTUALLY INTERTWINED WITH SURVIVING NON-FRIVOLOUS CLAIMS 26

A. A Prevailing Defendant May Not Collect Attorneys' Fees Under § 1988 Except in Unusual Circumstances 26

B. Because the Dismissed Federal Claim Was Factually Intertwined With Surviving Non-Frivolous Claims, Defendants Were Not Entitled to Any Attorneys' Fees 31

1. Defendants cannot recover fees when claims are factually intertwined because the dismissed claim imposes little incremental burden on the defendant 31

2. Plaintiffs' enforcement of the civil rights laws will be chilled by the threat of fees where claims are factually intertwined 36

3. The court of appeals' rule will yield perverse incentives and multiply litigation 43

II. THE MAGISTRATE ERRED IN AWARDING DEFENDANTS ALL THEIR FEES WITHOUT SEGREGATING THE FEES THAT WERE ATTRIBUTABLE EXCLUSIVELY TO THE DISMISSED CLAIM 48

A. The Most That Defendants Could Collect Are Fees Directly Attributable to the Dismissed Claim 49

B. The Court of Appeals Erred in Applying the Standard 52

CONCLUSION 56

TABLE OF AUTHORITIES

FEDERAL CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975) 26

Blum v. Stenson,
465 U.S. 886 (1984) 49

Buckley v. Am. Constitutional Law Found.,
525 U.S. 182 (1999) 41

Buckley v. Valeo,
424 U.S. 1 (1976) 38

Budinich v. Becton Dickinson & Co.,
486 U.S. 196 (1988) 50

Bustos v. Martini Club, Inc.,
599 F.3d 458 (5th Cir. 2010) 40

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) ..... *passim*

City of Riverside v. Rivera,
477 U.S. 561 (1986) 28

Clements v. Fashing,
457 U.S. 957 (1982) 38

Indep. Fed. of Flight Attendants v. Zipes,
491 U.S. 754 (1989) 30

Hanrahan v. Hampton,
446 U.S. 754 (1980) 44

Hardt v. Reliance Standard Life Ins. Co.,
130 S. Ct. 2149 (2010) 26

Hensley v. Eckerhart,
461 U.S. 424 (1983) ..... *passim*

Hughes v. Rowe,
449 U.S. 5 (1980) 37, 42, 45

LaSalle Nat. Bank v. First Connecticut Holding Group, LLC, 287 F.3d 279
(3d Cir. 2002) 37

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) 38

McKune v. Lile,
536 U.S. 24, 50 (2002) 38

Monell v. New York City Dept. of Social Servs.,
436 U.S. 658 (1978) 52, 53

Myers v. City of West Monroe,
211 F.3d 289 (5th Cir. 2000) 41

Newcomb v. Brennan,
558 F.2d 825, 829 (7th Cir. 1977) 41

Newman v. Piggie Park Enters., Inc.,
390 U.S. 400 (1968) 20, 28, 29

Northcross v. Bd. of Educ.of Memphis City Schs., 412 U.S. 427 (1973) 27

Republican Party of Minnesota v. White, 536 U.S. 765, 774 (2002) 40, 41

United States Steel Corp. v. United States 519 F.2d. 359 (3d Cir. 1975) 30

United States for Varco Pruden Bldgs. v. Reid & Gary Strickland Co., 161 F.3d 915 (5th Cir. 1998) 48, 50

Young v. New Process Steel, LP, 419 F.3d 1201 (11th Cir. 2005) 30

Zilich v. Longo, 34 F.3d 359 (6th Cir. 1994) 40

STATE CASES

A. Copeland Enters. Inc. v. Slidell Mem. Hosp., 657 So. 2d 1292 (La. 1995) 53

Cox v. W.M. Heroman & Co., Inc., 298 So. 2d 848 (La 1974) 53

Lamkin v. Brooks, 498 So. 2d 1068 (La. 1986) 52

State v. Vice, No. 08-255, 2008 WL. 5169955 (La. Ct. App. Dec. 10, 2008) 13, 14

FEDERAL STATUTES, RULES & LEGISLATIVE MATERIALS

15 U.S.C. §§ 1618n, 1681o 27

15 U.S.C. § 1640 27

15 U.S.C. § 1692k 27

20 U.S.C. § 1415 27

28 U.S.C. § 636 ..... 1, 18

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1441 1

28 U.S.C. § 1652 50

29 U.S.C. § 216 27

30 U.S.C. §§ 1270, 1275, 1293 27

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... *passim*

42 U.S.C. §2000a-3 27

42 U.S.C. § 2000b-1 27

42 U.S.C. § 2000e-5 27

42 U.S.C. § 7604 27

Fed. R. Civ. P. 11 46

Fed. R. Civ. P. 73 ..... 1, 18

110 CONG. REC. 6534, 13,688, 14,214 (1964) 33

122 CONG. REC. 33,313 (1976) 28

H.R. REP. NO. 94-1558 (1976) 28, 29, 30

S. REP. NO. 94-1011 (1976) *reprinted in* 1976 U.S.C.C.A.N. 5910 ..... 28, 29

STATE & LOCAL STATUTES

La. Rev. Ann. Stat. § 14:66 13

Tex. Civ. Prac. & Rem. Code Ann. § 38.001 50

Vinton, La., Ord. No. 402, § 1(120) (Dec. 20, 1994) 12

MISCELLANEOUS

Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. REV. 65 (1996) 37

Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599 (2004) 38

Vinton, La. Council Minutes (Sep. 30, 2003), http://www.cityofvinton.com/guestbook/guestbook.html 18

BRIEF FOR PETITIONER

OPINIONS BELOW[1]

The opinions of Magistrate Judges Alonzo P. Wilson and Kathleen Kay of the District Court for the Western District of Louisiana are reprinted at P.A. 35a-40a and 19a-34a, respectively. There is no district court opinion because the parties consented to a trial by magistrate judge for all purposes. Therefore, appeal was taken directly to the court of appeals from Magistrate Judge Kay's decision. *See* 28 U.S.C. § 636(c)(3); Fed. R. Civ. Pro. 73(c). The opinion of the U.S. Court of Appeals for the Fifth Circuit is published and reported at 594 F.3d 423 (5th Cir. 2010), and reprinted at P.A. 1a-18a. The order of the court of appeals denying rehearing en banc is reprinted at P.A. 41a-42a.

JURISDICTION

The court of appeals entered judgment on September 21, 2008, and denied rehearing en banc on April 16, 2010. The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1441. The jurisdiction of the court of appeals was based on 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] The Joint Appendix and Supplemental Joint Appendix are cited as "J.A." and "S.J.A.," respectively. The Cert. Petition and Petition Appendix are cited as "Pet'n" and "P.A.," and respectively. This is an R-rated story. Expletives and slurs throughout the record have been redacted in the interest of decorum.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), provides as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. §2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such

action was clearly in excess of such officer's jurisdiction.

INTRODUCTION

The plot of this case reads like something out of Grisham. But the twist is pure Kafka.

The plot: Retired State Trooper Fox runs to unseat the corrupt Chief of Police named Vice. The Chief unleashes a criminal plot to intimidate and humiliate Mr. Fox into abandoning the race. The Chief uses his office to get dirt from a sister law enforcement agency under the guise of "exchanging intel." J.A. 323. He sends an extortionate letter to Mr. Fox threatening to publish gross distortions of the "intel" he has collected if Mr. Fox does not abandon the race. When that does not work, he facilitates the release of a jailed crack dealer, and directs him to fake an angry public confrontation with Mr. Fox and file a criminal complaint falsely accusing Mr. Fox of despicable racial slurs. Just when things are looking bad for our hero, the FBI swarms in. Chief Vice is convicted of extortion, and Mr. Fox becomes the new Police Chief.

Now the twist: Mr. Fox decides to sue the Chief and the town. His lawyers tell him he has a claim for defamation, extortion, and intentional infliction of emotional distress. They are indisputably correct. They also tell him he has a civil rights claim based on the Chief's efforts to prevent him from exercising his First Amendment right to run for public office, and they raise that in the complaint as well. Defendants do not challenge Mr. Fox's complaint nor any of the claims raised in it. In fact, they invoke the

federal claim as the basis for removing the case from state court (where Mr. Fox chose to file it) to federal court.

After discovery, Mr. Fox's lawyers voluntarily drop just the civil rights claim. The state law claims all remain intact and are remanded to state court where the litigation began. A year later a new magistrate judge—who had had nothing to do with the case—finds that the federal claim included in Mr. Fox's complaint almost three years earlier is "without merit." P.A. 27a.

The magistrate does not sanction counsel. Instead, she orders Mr. Fox himself to pay attorneys' fees to the defendants. So now, the victim has to pay the convicted extortionist. Worse yet, Mr. Fox does not have to pay just *some* of his adversaries' fees. This lifelong public servant must pay every penny charged by his tormenters' lawyers—and the town's lawyers—for all their work while the rest of his claims are litigated in state court. Chief Vice's criminal plan was foiled, but he is on the verge of ruining Mr. Fox just the same.

This Court has held that courts may not award any fees to a defendant in a civil rights case unless the suit is frivolous or vexatious. The central question in this case is how this rule applies where the dismissed claim is factually interwoven with surviving claims. Here, the civil rights claim did not add any appreciable burden to the defense of the case; to the contrary, the original magistrate overseeing the action explicitly found that "[a]ny trial preparation, legal research, and discovery" involved to date "may

be used by the parties in the state court proceedings." P.A. 40a.

Under these circumstances, courts should not impose crushing penalties on the client. When a client conveys truthful factual allegations to his lawyers, and those allegations plainly support a claim for relief, the client should not be punished for lacking the sophistication, education, and confidence to direct his lawyers not to include a civil rights claim in the complaint.

STATEMENT OF FACTS

Police Chief Vice Launches a Criminal Plot to Interfere with Mr. Fox's Run for Public Office

Ricky Fox was a Marine Corps veteran who had served the State of Louisiana as a state trooper for 25 years when he retired in 2005. Where his fellow retirees might while away their twilight years watching reruns or poring over a stamp collection, Mr. Fox opted to rededicate himself to public service. In early 2005, he announced his plan to run for Police Chief of his hometown, the Town of Vinton, Louisiana. P.A. 2a.

Incumbent Police Chief Billy Ray Vice did not like that plan one bit. Chief Vice had been the owner of an auto parts store for nearly 25 years and had had no police experience when his buddy, the mayor, appointed him to complete the last six months of a term vacated by the previous chief. J.A. 394, 429-30. By his own admission, he "wasn't well informed in law enforcement." J.A. 432. Chief Vice had run for Police Chief once before and lost, J.A. 433, and he was not prepared to leave his fate in the hands of the

town's electorate again, especially against an opponent with Mr. Fox's record and experience. J.A. 324-26. So Chief Vice hatched a plot—using police personnel and police department resources—directed at intimidating and humiliating Mr. Fox into abandoning his campaign.

Chief Vice started with extortion and then continued by scheming with one of his officers to manufacture a highly explosive criminal complaint. Chief Vice could not have achieved either without abusing the power vested in him by the town. While some of the plot's details are disputed, there is no dispute that ample evidence supports the following narrative.

The Extortion Plot. The first step in the extortion plot was to dig up dirt on Mr. Fox. Chief Vice boasted to one of his officers that he "could have Ricky Fox crucified with one telephone call." J.A. 177. Chief Vice made that call (actually, he needed several) to State Police Commander Ken Delcambre, who had been Mr. Fox's supervisor when Mr. Fox was a state trooper. J.A. 318. Chief Vice was a complete stranger to the Commander. J.A. 319. He identified himself as the Chief of Police of Vinton, and asked the Commander for "any information about any of Ricky Fox's wrongdoing." J.A. 320. Playing on his official capacity, Chief Vice convinced the Commander to share information as though they were "exchanging intel." J.A. 323.

It never dawned on the Commander that Chief Vice planned to use that intel as the basis for a criminal extortion plot. *Id.* Accordingly, after several pestering calls from Chief Vice, the Commander re-

counted whatever he could recall that might conceivably be cast in a negative light. J.A. 321-23.

Chief Vice took that information and liberally embellished every tidbit into a grotesque distortion of the truth. He then incorporated the smear into a threatening letter that he sent Mr. Fox in January 2005. J.A. 349. The letter began:

> MR FOX
>
> WE ARE GLAD THAT YOU ARE FINALLY GIVING US THE OPORTUNITY [SIC] TO PAY YOU BACK FOR SOME OF THE THINGS THAT YOU HAVE DONE TO SOME OF YOUR FELLOW TROOPERS OVER THE PAST YEARS. EACH WEEK WE ARE GOING TO PUT AN[] ADD [SIC] IN YOUR VINTON NEWSPAPER ....

J.A. 33. The letter then threatened that the weekly ad would report to the public an outrageously defamatory statement along the lines of "CITIZENS OF VINTON DID YOU KNOW THAT RICKY FOX SHOT A BLACK MAN IN THE BACK WITH A SHOT GUN" even though he "[K]NEW THEY [sic] HAD NO GUN[?]" J.A. 34. The letter listed seven other accusations that voters would want to know: Grand theft. Perjury. Insurance fraud. Police intimidation. Racism. Sexual harassment. Adultery. The letter continued:

> WE JUST THOUGHT WE WOULD GIVE YOU A LITTLTASTE [SIC] OF WHAT WE GOT[.] WE WILL PROBABLY SEND A COPY OF THIS TO EVERYONE THAT SUPPORTS YOU[.] WE DON'T THINK IT WILL DO ANY GOOD TO SEND THIS LETTER OUT UNTILL [SIC] AFTER YOU START RUNNING. I KNOW ALL THE LOCAL CHURCHES AND WOMENS GROUP [SIC] AND OTHER POLITIANS [SIC] SUCH AS THE

> CHIEF, MAYOR, AND ALDERMAN WOULD LIKE A COPY.

J.A. 35-36.

Chief Vice did not sign the letter. He sent it anonymously—but obviously tried to create the impression that it came from Mr. Fox's former colleagues in state law enforcement.

Chief Vice immediately tried to leak the letter to the press in the hope of getting coverage that would leave Mr. Fox's reputation in tatters. J.A. 232-35, 288-89. The press would not go near the letter nor the incendiary charges it contained. J.A. 470.

The Trumped-Up Complaint. Mr. Fox took the letter seriously enough to hand it over to the Federal Bureau of Investigation, but gave no sign of giving in to its cowardly and anonymous threats. So Chief Vice moved on to Plan B: He conspired with one of his officers to manufacture an equally outrageous criminal charge designed to ruin Mr. Fox's reputation in the town he and his family had lived in for 25 years. The scheme was as simple as it was sinister: Recruit a vulnerable confederate to instigate a sham confrontation before a large crowd, coach him to feign outrage and indignation (as loudly as possible), and then manufacture a criminal complaint falsely accusing Mr. Fox of flinging around racially charged threats. Chief Vice expected that the ensuing rumors—however false—would destroy Mr. Fox's campaign and guarantee Chief Vice the office he was so desperate to keep. All he needed was a co-conspirator, a shill, a public setting, and an angry confrontation.

Chief Vice found a willing co-conspirator in one of his officers, Troy Cary, who had no interest in seeing the police department run more professionally under a new Chief Fox. J.A. 279. Officer Cary, who, like Chief Vice, had only a few months' experience with the Vinton Police Department, knew that he would have to reapply for his position—along with everyone else—if Mr. Fox were elected, and he knew he had little chance of keeping his job in a new administration. J.A. 390. Officer Cary was content with the lax administration of the inexperienced Chief Vice, whom he could control. J.A. 279. In fact, Chief Vice promoted Officer Cary to the rank of detective after demoting one of Mr. Fox's friends and supporters. J.A. 391-92, 451. So, Chief Vice had his motivated co-conspirator.

Next, the shill. Chief Vice had a jail full of compliant subjects at his disposal. He chose a 23-year-old crack dealer named Joe Budwine whom he and Vinton Police Officer Arthur Phillips had arrested less than a month earlier for dealing crack. J.A. 260. Chief Vice approached him with an offer he couldn't refuse. According to Officer Phillips, Chief Vice committed to "try to get charges dropped against Joe Budwine if Joe Budwine would make a [false] complaint against Ricky Fox." J.A. 274. Mr. Budwine confirmed that Chief Vice promised to "take care of" him and even to "help [him] in so many ways" in the future "if [he] [got] in trouble" J.A. 252; *see* J.A. 249, 256, 258-59. But there was a problem: Mr. Budwine was in jail. That is, until his bond was mysteriously reduced from $240,000 to less than 1% of that amount, $2,300. J.A. 227-30, 261, 275, 353-55. Problem solved, shill ready.

Finding a public setting and manufacturing a confrontation were easy by comparison. Mr. Fox regularly cheered on his son's former high school basketball team. So there was little doubt he would be at the last game of the season. Mr. Budwine showed up 15 minutes before the end of the game. J.A. 338, 370. Because the team was down by 40 points at the end of its disastrous 0-for-31 season, J.A. 338, 382-83, all but a handful of the fans had dispersed, J.A. 337. But Mr. Fox stayed to the bitter end. He was sitting in a sea of empty bleachers with his wife and two friends, a librarian and a minister, when Mr. Budwine appeared. J.A. 337-38. Of all the gym seats in all the bleachers to choose from, Mr. Budwine walked up to them. He sat in front of Mr. Fox and immediately began shouting profanities. J.A. 339. Mr. Fox chided, "don't talk so loud." *Id.* Mr. Budwine then jumped up from his seat, ranting and raving. J.A. 340. Mr. Budwine raised such a ruckus that the high school principal escorted him from the gym and banned him from returning. *Id.* Once outside, Mr. Budwine continued shouting, "[I'll] get you, Ricky Fox, and your son then too." J.A. 341. Things were going according to plan: It was a public spectacle. The set-up was a success.

Mr. Fox called the Vinton Police Department to log the incident. J.A. 343. But the police already knew about the episode firsthand. Officer Cary had appeared at the gym—on-duty and in uniform—shortly before Mr. Budwine showed up. J.A. 340, 342. He stood guard at the gym entrance with the only other Vinton Police Officer on duty that night. J.A. 400-03. This was the first time Officer Cary had ever been to a game. J.A. 399. He stood idly by

throughout Mr. Budwine's performance. J.A. 402-03. He left just after Mr. Budwine was ejected. J.A. 343.

Now, to complete the plan. A couple of days after the incident, Chief Vice directed Officer Phillips to haul Mr. Budwine into the Vinton Police Station. J.A. 282-83. Although Officer Phillips thought it odd, J.A. 282, he followed the order. Of course, Mr. Budwine knew what he was being taken in for: to file a complaint against Mr. Fox. J.A. 250-51, 284. Meanwhile, Chief Vice called Officer Cary back to the station so that he—and not Officer Phillips—would take Mr. Budwine's complaint. J.A. 404, 461-62. They were ready for Mr. Budwine when he arrived and declared their intention to do whatever it took to keep "this son-of-a-b**ch out of office." J.A. 285.

Mr. Budwine began as best he could to write out his complaint. But it was not good enough. So Officer Cary snatched it away and tore it up. J.A. 285-86, 294. He gave Mr. Budwine a clean sheet of paper and proceeded to dictate a better complaint. J.A. 294. Mr. Budwine dutifully transcribed the story as his own. J.A. 294-95. In it, he alleged that he had overheard Mr. Fox loudly "tell some other man" how the world would change "if [Mr. Fox] got in office." According to the complaint, Mr. Fox vowed that "([n]i***rs) thought it was bad back then[;] this time [they] will not be able to shop at the local food stores here in Vinton." S.J.A. 6. According to the fabricated account, an astonished Mr. Budwine interrupted Mr. Fox and "we got to arguing." *Id.* Mr. Fox threatened "he would Remove [sic] me from the premises." *Id.* Armed with Mr. Budwine's false

narrative, Officer Cary filled out an Incident Report accusing Mr. Fox of "Disturbing the Peace by Racist Language." Vinton, La., Ord. No. 402, § 1(120) (Dec. 20, 1994).

Of course, no one in Chief Vice's department ever spoke to Mr. Fox about the incident at the high school. J.A. 345-46. Nor, of course, did anyone investigate Mr. Budwine's allegations; no sense in investigating charges you know to be fabricated. J.A. 414-16, 487. At Chief Vice's direction, Officer Phillips simply delivered the report and Mr. Budwine's complaint to the District Attorney's office. J.A. 462. When the DA declined to take action, J.A. 377, Chief Vice set out to get press attention. He called a reporter at a local paper, J.A. 290-92, and directed Officer Phillips to work the press too—he specifically wanted Officer Phillips to persuade an African-American reporter to publish the story. *Id.* Meanwhile, Officer Cary leaned on Mr. Budwine to share the story with the press. J.A. 232-35. Chief Vice got an audience with at least two reporters. J.A. 290-92, 406-07. But ultimately, not a single paper found the story sufficiently credible to publish. Finally, Chief Vice shared copies of Mr. Budwine's complaint against Mr. Fox with the National Association for the Advancement of Colored People and instructed his officers to spread the word as well. J.A. 410-12, 414. The police got no traction with the NAACP, but the plan was not a total failure; the charges of racism were the talk of the town and were enough to distress Mr. Fox and generate hostility among his friends and voters. J.A. 381-82.

Mr. Budwine, for his part, received the reward Chief Vice had promised: All but one of the charges

originally filed against him were dropped. He pleaded guilty to that one charge. J.A. 231.

Mr. Fox Is Elected Police Chief, While Chief Vice Is Convicted

Call it karma or just desserts, but what happened next was the sort of reversal of fortune that is usually reserved for B-movies: Mr. Fox won the election and became Chief of Police. J.A. 324. Chief Vice became a convicted felon. *State v. Vice*, No. 08-255, 2008 WL 5169955 (La. Ct. App. Dec. 10, 2008). Officer Cary quit the force without notice and, when the criminal investigation was announced, skipped town to work on a cattle ranch. J.A. 387-88, 463-64.

Unbeknownst to Mr. Fox, the FBI and the Louisiana State Police opened an investigation against Chief Vice, replete with wiretaps and secret recordings. J.A. 199, 271-72, 309. Convinced that Chief Vice and Officer Cary were committing a crime, Officer Phillips served as an informant. J.A. 272. Once confronted with the evidence, Chief Vice confessed that he wrote the threatening letter—an admission he later recanted. J.A. 303; *see also Vice*, 2008 WL 5169955, at *3. He also admitted that he actively sought to have the letter published. J.A. 466; *see also Vice*, 2008 WL 5169955, at *4.

A state grand jury indicted Chief Vice for the anonymous letter, the fabricated complaint, and an unrelated matter in a three-count indictment alleging criminal malfeasance, filing false records, and criminal extortion. J.A. 85. Two years later, a jury found him guilty of extortion. *See* La. Rev. Ann. Stat. § 14:66. The court sentenced him to five years hard labor, suspended, and two years supervised

probation. Chief Vice's conviction and sentence were affirmed on appeal. *See Vice*, 2008 WL 5169955, at *7.

Mr. Fox Sues the Perpetrators and the Town in State Court

Neither karma nor his election compensated Mr. Fox for the harm Chief Vice inflicted on him. Mr. Fox consulted counsel, who concluded that he had a viable case against the police officials and the Town of Vinton.

Mr. Fox sued Chief Vice, Officers Cary and Phillips, and the town. He filed the suit in Louisiana state court—not federal court. As the court of appeals and both magistrates below acknowledged, Mr. Fox's "complaint ... allege[d] that these defendants conspired to violate Fox's constitutional rights and to commit criminal and tortious acts against Fox." P.A. 36a; *see* P.A. 21a (Fox sought damages "for a violation of his civil rights under 42 U.S.C. § 1983 and under state tort law"); P.A. 3a (Fox "claimed federal and state causes of action"). No one disputes that the complaint made out a case for three separate common law torts: defamation, extortion, and intentional infliction of emotional distress. P.A. 38a. "[I]n the alternative" to the state law claims, Mr. Fox's lawyers also asserted a federal civil rights claim under 42 U.S.C. § 1983. J.A. 40-41. They invoked "rights privileges and immunities afforded by our Constitution," specifically, "the right to seek public office" and "the right to Due Process." J.A. 41.

In both the federal and the state claims, Mr. Fox alleged that the town was liable for the conduct of its Police Chief and officers. J.A. 40-41.

Defendants Remove to Federal Court and Proceed with Discovery

Defendants did not move to dismiss Mr. Fox's federal claim (or any other claim) for failure to state a claim. They did the opposite: On the basis of the federal claim, they removed the case to federal court. P.A. 23a.

The civil case sat dormant for well over a year awaiting the outcome of the criminal prosecution. During that time, not one of the Defendants filed a motion to dismiss or even suggested a flaw in Mr. Fox's § 1983 theory. So far as appears from the record, the only exchange about the merits of the § 1983 claim was correspondence between Mr. Fox's lawyers and the town lawyers about whether the town could be held liable without evidence of a municipal policy that was the "moving force" behind any constitutional violation. J.A. 200-01.

Once Chief Vice was convicted, the parties conducted basic fact discovery for the civil case, gathering relevant information in connection with all Mr. Fox's claims. Mr. Fox's lawyers deposed all the participants in the scheme—Chief Vice, Officers Phillips and Cary, and Mr. Budwine. J.A. 199. Defendants deposed Mr. Fox about what he witnessed and the basis of his complaints. J.A. 324-86. Among the areas they covered were his tort law claims, allegations, and damages. J.A. 328-30, 332, 341, 349-50, 355, 359-62. The parties also pored over the record of the criminal investigation by the FBI and State Police; listened to FBI wire tape recordings; and scoured the testimony and full record of the state criminal trial. J.A. 199.

Discovery exposed yet another constitutional violation the police perpetrated under Chief Vice's oversight: With Chief Vice's approval, Officer Cary began to "[w]rite" a citation to "every son of a b***h that's behind ... Ricky Fox." Deposition Testimony of Arthur Phillips at 153 (Feb. 28, 2007) (attached to Docket Doc. # 77); *see* J.A. 280-81, 286-87. Evidence even emerged that Chief Vice may have used his influence to help his supporters extinguish citations they had received. J.A. 286.

Counsel Withdraws Mr. Fox's Federal Claim, and the Magistrate Awards Full Attorneys' Fees

Following discovery, Defendants moved for summary judgment on Mr. Fox's federal claim. J.A. 128-67. The motion was never heard. With the benefit of the evidence gathered in the criminal case, discovery in the civil case, and briefing on the motion, Mr. Fox voluntarily moved to dismiss his federal claim and remand the case back to state court to try his state law claims. P.A. 37a-38a. In response, the magistrate dismissed Mr. Fox's federal claim "by agreement of all parties." P.A. 39a.

Hoping to remain in federal court rather than return to Mr. Fox's preferred forum, Defendants asked the magistrate to exercise supplemental jurisdiction over the surviving state law claims. P.A. 38a. The magistrate declined and remanded the state law claims. P.A. 40a. As he sent the state claims back, the magistrate went out of his way to emphasize that "[a]ny trial preparation, legal research, and discovery" involved to date "may be used by the parties in the state court proceedings." *Id.*

At that point, Defendants moved for attorneys' fees alleging that Mr. Fox's federal claim was—and had always been—frivolous. J.A. 199. They did not acknowledge even the existence of state law claims, much less their continuing viability. Nor, in their voluminous submission of billing records, did they point to a single minute they spent conducting discovery on the federal claim that would not have also been required to explore the state claims. Indeed, overall, the billing records reflect no more than a handful of hours dedicated to work on the federal claim alone, almost all of it in connection with the removal and remand. *See* S.J.A. 8-67.

None of that troubled a new magistrate who, with no prior involvement in the case, decided the attorneys' fees motion a year after it was filed. She did not find that Mr. Fox's federal claim was "frivolous or vexatious" as required for an award of attorneys' fees to a defendant; instead she believed that she could award fees against Mr. Fox if his position was "vexatious, frivolous, *or otherwise without merit.*" P.A. 27a (emphasis added). She found this last condition met because "the plaintiff failed to make out a *prima facie* case." *Id.*

The magistrate then granted Defendants *all* the fees they had incurred over the course of the entire three-year litigation as though the federal claim was the only claim that had ever been in the case. P.A. 34a. She acknowledged that "[n]ormally, a party seeking attorneys' fees must segregate successful claims from unsuccessful claims." P.A. 28a. But she did not even acknowledge the original magistrate's view that "[a]ny trial preparation, legal research, and discovery may be used by the parties in the state

court proceedings," P.A. 40a, much less analyze what proportion of Defendants' attorneys' fees were attributable only to the dismissed federal claim. Instead, she concluded that there is an exception—and "no segregation is ... required"—"where various claims 'arose out of the same transaction and were so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts.'" P.A. 28a (citation omitted). This had serious consequences to Mr. Fox; the fees and costs came to $54,481. P.A. 34a. That was two years' salary—a crushing sum for a lifelong public servant in a small town in Louisiana. *See* Vinton, La. Council Minutes (Sep. 30, 2003), http://www.cityofvinton.com/guestbook/guestbook.html (setting chief's salary at $23,000 in 2003).

Mr. Fox appealed the decision directly to the Fifth Circuit. *See* 28 U.S.C. § 636(c)(3); Fed. R. Civ. Pro. 73(c).

A Split Panel of the Court of Appeals Affirms

A split panel of the Fifth Circuit affirmed. The majority held Mr. Fox's statement—that the civil rights claim could not be sustained—"represented recognition that Fox's federal claims should never have been brought." P.A. 6a. According to the majority, "Fox's claims are groundless because the offenses *alleged in his Complaint* have no redress in the Constitution or laws of the United States." P.A. 8a (emphasis in original).

The majority rejected Mr. Fox's argument that it was improper to award fees because the state law claims survived. P.A. 10a. Noting a split among the circuits, the court held "that a defendant does not

have to prevail over an entire suit in order to recover attorneys' fees for frivolous § 1983 claims." *Id.*

As to the amount of the fees, the majority correctly noted that "a defendant is only entitled to attorneys' fees for work which can be distinctly traced to a plaintiff's frivolous claims." P.A. 11a. Nonetheless, in deference to the magistrate's discretion, the court affirmed her award, including her failure to segregate fees related to the § 1983 claim. P.A. 12a. Relying exclusively on the magistrate's assertions that the parties' "focus" was on Mr. Fox's § 1983 claim, that Defendants' request for fees related only to the federal court proceedings, and that Defendants "d[id] not appear" to request fees "related to the defense of the state law claims," the court held that the magistrate had not abused her discretion in awarding Defendants all the fees they requested for the entire litigation. *Id.*

Judge Southwick dissented. P.A. 12a-18a. He opined that the magistrate applied the wrong standard when she refused to segregate the fees related to the § 1983 claim from the fees related to the state law claims. P.A. 14a. "[W]hen some claims are dismissed as frivolous and others are not, allowing a defendant full recovery of his fees because the services for the various claims are too interrelated gives too much." P.A. 16a. He further observed that "almost all the defendant's discovery and factual analysis would have been necessary even if no federal claims had been brought." *Id.* "Generally," he continued, "the same witnesses would be deposed, the same documents produced, and the same factual disputes resolved. Only the legal work allocable solely or dominantly to the dismissed federal claims

was unnecessary." *Id.* In the end, he insisted, "[t]he only fees Fox should be required to pay are those solely applicable to his federal claims"—specifically "for the legal services necessary to remove the action and now to address the remand, as well as any services uniquely arising from the legal work to have the Section 1983 claims dismissed." P.A. 17a.

SUMMARY OF ARGUMENT

Defendants were not entitled to any fees at all. But even if Defendants were entitled to some fees, it was error to award them *all* the fees they incurred.

I. The fee-shifting provision in statutes like § 1988 treat prevailing defendants differently from prevailing plaintiffs. Prevailing plaintiffs ordinarily recover their fees. But prevailing defendants cannot recover their fees, except in the rare circumstance where "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983),.

This Court has explained that the reason for the asymmetry is that "[a] successful defendant seeking counsel fees ... must rely on quite different equitable considerations" from a prevailing plaintiff. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978) (emphasis added). Although the plaintiff is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority,'" *Id.* at 418 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)), the defendant—even if successful—is not. Whereas a losing defendant is, by definition, a law-breaker, the losing plaintiff is not.

This was a single, indivisible tort suit. Mr. Fox sought damages, under several legal theories, for a single scheme perpetrated by Chief Vice and his henchman. Only one claim was dismissed, leaving the defendants to defend all the others. Because all the legal claims were founded on the same facts, the defense counsel would have needed to perform the same work whether or not the federal claim had been in the case. Moreover, there was no wasted time or effort; every shred of evidence developed in discovery remains relevant after the dismissal. Under these circumstances, the "equitable considerations" that have guided this Court's past decisions prohibit an award of attorneys' fees. *Christiansburg*, 434 U.S. at 419.

First, the only legitimate basis to grant fees to a prevailing defendant under § 1988 is "to protect defendants *from burdensome litigation* having no legal or factual basis." *Id.* at 420 (emphasis added). Where the entire lawsuit is frivolous, or where the dismissed claim is factually distinct from meritorious claims that survive, the burden is manifest and fees are justified. But where the dismissed claim entailed little additional burden—as is almost always the case where the dismissed claim is factually intertwined with the surviving claims –no fees should be granted. The court of appeals erred in overlooking this distinction.

The court of appeals also erred in uncritically applying to partially prevailing defendants the same rule that applies to partially prevailing plaintiffs. A plaintiff who prevails on only one of several intertwined claims can recover some or all of the fees incurred, depending on the result achieved. But de-

fendants are not entitled to the benefit of the same rule precisely because they are situated differently with respect to the policies that § 1988 is designed to advance.

Second, a rule requiring a plaintiff to pay attorneys' fees in these circumstances could have devastating consequences to the enforcement of federal law and to the progress of the law. Advocates of all ideological stripes have advanced arguments that ultimately prevailed before this Court, even though they may have appeared meritless under existing doctrine—even frivolous—when first advanced. Any plaintiff who knows he could be punished with crushing fees for asserting a federal claim would think twice about including that claim.

Such a plaintiff will draw scant comfort from the assurance that he will have to pay his adversary's fees only if the court views his claim not just as meritless, but as frivolous. As this Court has observed, any lower court can fall prey to "the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22. This Court's admonition to "resist ... the temptation" does not change the reality that judges are human beings who can sometimes have trouble distinguishing a claim they find meritless from one that is downright frivolous.

This case powerfully illustrates the point. Mr. Fox had a constitutional right at stake in this case—his First Amendment right to run for office and to advocate publicly about his qualifications—and am-

ple basis for alleging that Chief Vice, capitalizing on his official position, conspired to deprive him of that right. A lawyer would be justified in casting the case in § 1983 terms. Defendants certainly did not believe that the federal claim was frivolous from the start. They found the § 1983 claim sufficiently meritorious that they removed the case to federal court on that basis, and they never filed a motion to dismiss. The courts below indulged in classic *post hoc* reasoning in leaping from the counsel's willingness to withdraw the federal claim to the conclusion that it was therefore frivolous—a conclusion that was especially ironic because counsel may well have been wrong in conceding the federal claim had no merit.

Third, dangling the prospect of attorneys' fees before prevailing defendants will put all the incentives and burdens for all participants—the lawyers, the clients, and the defendants—in the wrong places. If a client can be punished because his lawyer decides to jettison a federal claim before trial, lawyers will stop making those judgments. The result will be needless litigation, more complicated cases, busier courts, and more confused juries.

Moreover, where the client presented his lawyers with a sound factual basis for judicial relief, it is unfair to punish the client for the lawyer's decision as to what legal claims match the fact pattern. It is the lawyer's job, not the client's, to map the facts onto the right legal theory. Insulating clients from paying attorneys' fees for a wrong legal theory will not lead to abuses. There are consequences for pressing frivolous claims—Rule 11 sanctions. Rule 11 is a much more suitable vehicle for protecting defendants where a frivolous federal claim is factually inter-

twined with other viable claims. Rule 11 places the onus where it belongs, enshrining the common-sense principle that clients cannot be held responsible for their counsel's legal judgments.

II. Even if Defendants were entitled to *some* fees, the courts below erred in awarding every penny they incurred in defending the entire two-year litigation.

The court of appeals stated the correct rule: The most a defendant should ever recover are the fees directly and exclusively attributable to a frivolous claim—fees that would not have been incurred but for the inclusion of the claim. The touchstone, again, is Congress's limited objective in allowing an award of fees to a prevailing defendant: "to protect defendants *from burdensome litigation* having no legal or factual basis." *Christiansburg*, 434 U.S. at 420 (emphasis added). This objective justifies nothing more than compensation for the incremental burden occasioned by the frivolous claim. Any work that defense counsel would have had to do anyway was not the result of the frivolous claim.

Here, Defendants have managed to defeat only one claim—on purely legal grounds—but still stand to be held fully liable on any of the several remaining viable common law theories. Even a plaintiff in this situation would not be awarded all attorneys' fees incurred. If this Court were to apply the allocation principle it applies to plaintiffs, Defendants here would collect nothing—at least not yet. Even with the voluntary dismissal of the federal claim, Defendants still had a lot to lose; they still faced the prospect of a hefty damages award on the state law torts.

Although the court of appeals announced the correct rule, it promptly eviscerated the rule with several improper leaps of logic. First, the court of appeals incorrectly concluded that the complaint was purely federal. To the contrary, it featured the state law claims prominently. Second, it is simply not true that, throughout the litigation, "'the focus of both plaintiff and defendants was plaintiff's § 1983 claim.'" P.A. 12a (quoting P.A. 33a). Defendants were always keenly aware of the independent force of all the state law claims. In any event, it does not matter what legal theories most occupied Defendants' minds as they were conducting discovery. What matters is that the federal claim did not impose any more of a litigation burden on Defendants than they would have had to endure if only state law claims had been pled.

Congress passed § 1988 and other similar statutes to encourage plaintiffs to enforce federal law and to ensure that Defendants get compensated fairly for litigation burdens to which they should never have been subjected. An affirmance of the fee award here will only encourage plaintiffs to drop federal claims from their suits, to the detriment of the public good, and bestow windfall recoveries on Defendants.

ARGUMENT

I. THE MAGISTRATE ERRED IN AWARDING ANY ATTORNEYS' FEES AGAINST MR. FOX FOR A DISMISSED FEDERAL CLAIM THAT WAS FACTUALLY INTERTWINED WITH SURVIVING NON-FRIVOLOUS CLAIMS.

When it comes to attorneys' fees in a federal civil rights case, defendants are very different from plaintiffs: While prevailing plaintiffs routinely collect their fees, a prevailing defendant is never entitled to fees unless the plaintiff's position was frivolous or vexatious. *See infra* Point I.A. Mr. Fox's federal claim was neither frivolous nor vexatious and the magistrate erred in awarding fees simply because she deemed the claim "otherwise without merit." P.A. 27a; *see* Pet'n 25-28. But this appeal is premised on the assumption that the § 1983 claim was frivolous.[2] Even with that assumption, Defendants were not entitled to any fees, because the dismissed federal claim was factually intertwined with surviving claims and imposed no appreciable burden on Defendants. *See infra* Point I.B.

A. A Prevailing Defendant May Not Collect Attorneys' Fees Under § 1988 Except in Unusual Circumstances.

Ordinarily, under the "American Rule," each party to a lawsuit bears its own attorneys' fees. *Alyeska*

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[2] The Cert. Petition argued that the claim was not frivolous, *see* Pet'n 25-28, but did not raise the fact-bound issue as a separate Question Presented. Nevertheless, the errors of the courts below provide cautionary tales that are instructive in crafting the correct legal rule. *See infra* at 38-42.

Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269-71 (1975). Congress has crafted an exception to this "bedrock principle" for certain litigation critical to advancing federal interests. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2157 (2010). Among these favored litigations are suits to protect civil rights, the environment, equal employment opportunity, equal educational opportunity, fair labor standards, and fairness in consumer credit and debt collection.[3]

Civil rights cases like this one are governed by the fee-shifting provision of § 1988, which provides: "In any action or proceeding to enforce a provision of [various civil rights statutes] ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. Most federal fee-shifting statutes employ similar "prevailing party" language, and courts generally interpret this language the same wherever it appears. *See Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

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[3] *See* 42 U.S.C § 1988 (Civil Rights Attorney's Fees Awards Act of 1976), 42 U.S.C §§ 2000a-3(b), 2000b-1, 2000e-5(k) (Titles II, III and VII of Civil Rights Act of 1964); 42 U.S.C § 7604(d) (Clean Air Act), 33 U.S.C. §§ 1365(d), 1369(b)(3) (Clean Water Act); 30 U.S.C. §§ 1270(d), 1275(e), 1293(c) (Surface Mining Control and Reclamation Act); 29 U.S.C. § 262(b) (Age Discrimination in Employment Act), 20 U.S.C. § 1415(i)(3)(B) (Individuals with Disabilities Education Act), 29 U.S.C § 216(b) (Fair Labor Standards Act); 15 U.S.C. § 1640(a)(3) (Truth in Lending Act), 15 U.S.C. §§ 1618n(c), 1681o(b) (Fair Credit Reporting Act), 15 U.S.C. § 1692k(a)(3) (Fair Debt Collection Practices Act).

Whenever this Court has devised rules to effectuate this directive, its touchstone has been the congressional imperative to use attorneys' fees to encourage parties and their lawyers to bring the suits in question, and, correlatively, the imperative *not* to discourage them: "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (quoting H.R. REP. NO. 94-1558, at 2 (1976) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968))) (some internal quotation marks omitted). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *Id.* (quoting 122 CONG. REC. 33,313 (1976) (remarks of Sen. Tunney)). To ensure that "private citizens are ... able to assert their civil rights, and [that] those who violate the Nation's fundamental laws are not to proceed with impunity," Congress concluded that "citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *Id.* at 578 (quoting S. REP. NO. 94-1011, at 2 *reprinted in* 1976 U.S.C.C.A.N. 5910).

The fee-shifting provision is not, however, reserved exclusively for plaintiffs. Section 1988 permits a "prevailing party" to seek fees without regard to which side of the "*v.*" the party is on. But the rules are not the same for both sides. *See Christiansburg*, 434 U.S. at 416-21. On the one hand,

prevailing plaintiffs "'should ordinarily recover an attorney's fee'" under § 1988 because they enforce important federal rights. *Hensley*, 461 U.S. at 429 (quoting S. REP. NO. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (quoting *Newman*, 390 U.S. at 402)). On the other hand, defendants *never* get their fees, except in the rare circumstance where "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley*, 461 U.S. at 429 n.2 (citing H.R. REP. NO. 94-1558, at 7 (1976)); *see Christiansburg*, 434 U.S. at 421.

The reason for this asymmetry is that "[a] successful *defendant* seeking counsel fees ... must rely on quite different equitable considerations." *Christiansburg*, 434 U.S. at 419 (emphasis added). The considerations are different in multiple ways.

As an initial matter, prevailing plaintiffs and defendants occupy different positions with respect to the advancement of federal interests. The plaintiff is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg*, 434 U.S. at 418 (quoting *Newman*, 390 U.S. at 402). Awarding fees against plaintiffs simply because they lost would "substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement" of the civil rights laws. *Christiansburg*, 434 U.S. at 422. Congress cautioned that "'private attorneys general' should not be deterred from bringing good faith actions to vindicate ... fundamental rights ... by the prospect of having to pay their opponent's counsel fees should they lose." S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912.

In contrast, "defendants ... do 'not appear before the court cloaked in a mantle of public interest,'" even when they prevail. H.R. Rep. No. 94-1558, at 6 (quoting *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3d Cir. 1975)). Because a defendant does not advance any federal policy by fending off a suit, requiring him to pay his own fees poses no threat to any national interest or congressional policy, much less one of the "highest priority."

Conversely, losing plaintiffs and defendants are also situated differently. A losing defendant is, by definition, a law-breaker. *See Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989) ("Our cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes."). The losing plaintiff is not. When a plaintiff loses, that means only that he has failed to prove his case, not that he violated any law or compromised any important federal policy. *See Christiansburg*, 434 U.S. at 418-19.

Finally, plaintiffs and defendants confront different economic realities. While Congress concluded that the prospect of obtaining attorneys' fees is necessary to entice plaintiffs and their lawyers to bring suits to enforce the civil rights laws, "few defendants need any incentive to defend themselves when sued." *Young v. New Process Steel, LP*, 419 F.3d 1201, 1205 (11th Cir. 2005).

B. Because the Dismissed Federal Claim Was Factually Intertwined With Surviving Non-Frivolous Claims, Defendants Were Not Entitled to Any Attorneys' Fees.

The "equitable considerations" that underlie this Court's attorneys' fee decisions dictate the proper outcome here. *Christiansburg*, 434 U.S. at 418. Where claims are factually intertwined, seeking recovery for the same misdeed—albeit under different legal theories—the defendant is not entitled to fees when only one claim is dismissed and the others proceed. In those circumstances, an award of fees (1) would grant defendants a windfall they do not deserve; (2) would unduly chill plaintiffs; and (3) would yield perverse incentives and multiply litigation. We address each point in turn.

1. Defendants cannot recover fees when claims are factually intertwined because the dismissed claim imposes little incremental burden on the defendant.

If, as is demonstrated above, the only reason Congress permits defendants to seek fees is "to protect defendants *from burdensome litigation* having no legal or factual basis," *Christiansburg*, 434 U.S. at 420 (emphasis added), then defendants should not receive fees for a claim that yields little incremental burden. That is the situation in this case.

This was a single, indivisible tort suit. Mr. Fox sought damages, under several legal theories, for a single scheme perpetrated by Chief Vice and his henchman. Defendants faced considerable financial

exposure on any one of those theories, whether Mr. Fox proved that the Chief's scheme constituted extortion, defamation, intentional infliction of emotional distress, or a violation of his civil rights. The unitary nature of this action has several consequences for this case and for most any suit in which only one of several factually intertwined claims is dismissed.

First, as the dissent below observed, because the same facts were relevant to all claims, defense counsel would have needed to perform the same work whether or not the federal claim had been in the case. P.A. 16a. The parties would have been the same. They would have taken the same depositions from the same fact witnesses. They would have pored over the same record of the criminal trial. The interrogatories and document requests would have been essentially the same as well. Not surprisingly, defense counsels' time sheets reveal that very little of their work was specific to Mr. Fox's federal claim; it was limited to researching § 1983 and filing the removal petition. *See* S.J.A. 8-67.

Second, every shred of evidence developed in discovery remains relevant after the dismissal. As the magistrate who presided over the pretrial proceedings confirmed: "Any trial preparation, legal research, and discovery" that Defendants conducted to that point "may be used by the parties in the state court proceedings." P.A. 40a. There was no wasted time or effort.

Third, in light of the potential damages, Defendants had the same incentive to defend the case vigorously, with or without the federal claim.

Fourth, there is no evidence—and no reason to believe—that Mr. Fox's motivation in adding the § 1983 claim was vexatious, harassing, or oppressive or that Defendants felt more vexed, harassed, or oppressed by virtue of the claim's inclusion. Mr. Fox was the victim, not the perpetrator, and the § 1983 claim was merely one of several alternative routes to redress for Chief Vice's criminal activity.

Under these circumstances, requiring a plaintiff to pay attorneys' fees is not necessary "to protect defendants *from burdensome litigation* having no legal or factual basis" *Christiansburg*, 434 U.S. at 420 (emphasis added). Far from it. Defendants faced the same litigation burden with or without the federal claim.

The situation is different when the *entire lawsuit* is frivolous. This was what Congress had in mind when it authorized fees against plaintiffs and what this Court had in mind when it discerned that intent. That is why this Court routinely recites legislative references to the availability of fee awards "'to deter the bringing of *lawsuits* without foundation,'" *Christiansburg*, 434 U.S. at 420 (emphasis added) (quoting 110 CONG. REC. at 13,668 (1964) (remarks of Sen. Lausche)), "'to discourage frivolous *suits*,'" *id.* (emphasis added) (quoting 110 CONG. REC. at 14,214 (1964) (remarks of Sen. Pastore)), and "'to diminish the likelihood of unjustified *suits* being brought,'" *id.* (emphasis added) (quoting 110 CONG. REC. at 6534 (1964) (remarks of Sen. Humphrey)).

To be sure, a frivolous claim appended to an otherwise non-frivolous suit can sometimes lead to the

"burdensome litigation" that Congress wished to deter and compensate. *See, e.g., id.* at 422 (noting the congressional purpose to "assure that this statutory provision will not in itself operate as an incentive to the bringing of *claims* that have little chance of success") (emphasis added). That could be the case, for example, where the frivolous claim is based on completely "different facts and legal theories"—so that it is essentially a "separate lawsuit[]" within a lawsuit. *Hensley*, 461 U.S. at 434-35 & n.10 (observing in dictum that if such an "unsuccessful claim" is frivolous, the defendant may recover attorneys' fees incurred in responding to it). When that occurs, the defendant may recover attorneys fees incurred in responding to the frivolous claim. But that is because, again, the separate and distinct claim imposes separate and distinct burdens. The same rationale has no bearing where, as here, the dismissed claim imposed little incremental burden.

This distinction between factually intertwined claims and factually distinct claims is not new. This Court draws the same distinction in determining how to compensate a *plaintiff* who prevails on some claims but not others. *See id* at 434-35. With plaintiffs, the issue arises in two different scenarios, and a different rule applies to each. Scenario 1 involves *discrete* claims: "In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories." *Id.* at 434. For that scenario, this Court has observed that "counsel's work on one claim will be unrelated to his work on another claim," and "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result

achieved.'" *Id.* at 435 (citation omitted). As a result, "no fee may be awarded for services on the unsuccessful claim." *Id.*

Scenario 2 involves *interrelated* claims: "In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories.... Such a lawsuit cannot be viewed as a series of discrete claims." *Id.* A completely different rule applies here: "[T]he district court should focus on the significance of the *overall* relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* (emphasis added). The reason is that "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.*

The court of appeals missed this critical distinction when it reasoned "that a defendant need not prevail over an entire suit in order to recover attorneys' fees for frivolous § 1983 claims." P.A. 10a. As noted above, that is certainly correct: If frivolous claims revolve around entirely *different facts*, and the defendant incurred fees directed specifically and exclusively to defend those frivolous claims, the defendant can recover fees without "prevail[ing] over an entire suit." *Id.* But the court of appeals erred in applying this rule in the very different situation where the claims are factually intertwined. P.A. 11a n.25 (recounting dicta from *Hensley*, 461 U.S. at 435 & n.25, about the circumstances under which a *plaintiff* can recover for interrelated claims) (emphasis added).

The court of appeals also erred in uncritically applying to Defendants the same rule that applies to partially prevailing plaintiffs: A plaintiff who prevails on only one of several intertwined claims can recover some or all of the fees incurred, depending on the result achieved. *Hensley*, 461 U.S. at 436-37. But that does not mean that a defendant is entitled to recover some or all of his fees when he prevails on one of several factually intertwined claims. In assuming symmetry, the court of appeals overlooked the different equitable considerations that apply on different sides of the "*v.*" Defendants are not entitled to the benefit of the same rule for all the reasons enumerated above: (1) the special status plaintiffs enjoy as proponents of congressional policy; (2) the difference in incentives between plaintiffs (who need financial incentives to challenge official misconduct) and defendants (who already have every incentive to defend themselves); and (3) the difference in status between a losing defendant, who is necessarily a violator of federal law, and an unsuccessful plaintiff, who is not. *See supra* at 29-30. In short, as this Court has determined, the asymmetric treatment of plaintiffs and defendants is appropriate because "[a] successful defendant seeking counsel fees ... must rely on quite different equitable considerations." *Christiansburg*, 434 U.S. at 419.

2. Plaintiffs' enforcement of the civil rights laws will be chilled by the threat of fees where claims are factually intertwined.

On the flip side of the equation, a rule awarding attorneys' fees against a plaintiff in these circumstances could have devastating consequences to the

enforcement of federal law and to the progress of the law.

Creative efforts to extend the law are "the very lifeblood of the law." *LaSalle Nat. Bank v. First Connecticut Holding Group, LLC*, 287 F.3d 279, 289 (3d Cir. 2002) (internal quotation marks and citation omitted). Nowhere has history shown that axiom to be more true than in the area of civil rights. Advocates of all ideological stripes have advanced arguments that ultimately prevailed before this Court, even though they may have appeared meritless under existing doctrine—even frivolous—when first advanced. That creativity is fragile. Any plaintiff who knows he could be punished with crushing fees for asserting a federal claim would think twice about including that claim, particularly if he thinks there is a safer state law basis on which to proceed.

Such a plaintiff will draw scant comfort from the assurance that he will have to pay his adversary's fees only if the court views his claim not just as meritless, but as frivolous. As this Court has observed, any lower court can fall prey to "the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22; *see Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Even the most objective "courts have had a fair amount of trouble developing standards for distinguishing frivolous cases from ordinary losers." Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A L. REV. 65, 66 (1996). "[A] judge is more likely to find a violation of Rule 11 (which is, after

all, a finding that a case or claim had a very low probability of success) when that judge already knows that the claim has been dismissed on the merits." Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 604-05 (2004). This Court's admonition does not change the fact that judges are human beings and sometimes unable to "resist the understandable temptation."

This case powerfully illustrates the point. Mr. Fox had a constitutional right at stake – his First Amendment right to run for office and, at a minimum, his right to speak out in support of his own election. *See, e.g., McKune v. Lile*, 536 U.S. 24, 50 (2002) (recognizing in dictum "the First Amendment right to run for office") (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977)); *Clements v. Fashing*, 457 U.S. 957, 984 n.4 (1982) (Brennan, J. dissenting) ("right to seek public office [is] a right protected by the First Amendment"); *Buckley v. Valeo*, 424 U.S. 1, 57 (1976). He had ample basis for alleging that Chief Vice conspired to deprive him of that right through extortion, defamation, and public humiliation. He also had a ground for alleging that Chief Vice used his position as a public official to advance his illegal scheme: exploiting his authority as Police Chief to extract unfavorable "intel" from Commander Delcambre; casting a prisoner as pawn in the ruse against Mr. Fox and arranging that convict's release on reduced bail; sending uniformed officers on official business to oversee the arranged confrontation, and then filing the false police report. *None* of this would have been possible but for the

government office and authority Chief Vice enjoyed and abused.

Hearing this story, a lawyer would be justified in casting the case in § 1983 terms. Defendants certainly did not act as if the federal claim was frivolous from the start. Nine attorneys in seven separate law offices represented the four Defendants. Not one of them saw fit to file a motion to dismiss when they first saw the complaint, or at any time in the ensuing two years. To the contrary, they found the § 1983 claim sufficiently meritorious that they removed the case to federal court on that basis. And when conversation turned to the merits of the claim, they challenged a different aspect—whether there was a "municipal policy" involved—an issue that could not be resolved on the face of the complaint before discovery and that would apply only to one of the Defendants. J.A. 200.

In concluding that Defendants were entitled to attorneys' fees, the court of appeals and the magistrate both cited counsel's "admi[ssion] that [they] had failed to properly present any federal cause of action." P.A. 3a; *see also* P.A. 24a. From this observation, the court of appeals concluded that "Fox's claims" were "groundless because the offenses *as alleged in his Complaint* have no redress in the Constitution or laws of the United States." P.A. 8a (emphasis in original); P.A. 27a (same conclusion). That is a classic case of *post hoc* reasoning: Because the magistrate thought the claim incorrect, she leapt to the conclusion that it was frivolous when filed. But even though Mr. Fox did not succeed, the federal claim was not so far beyond the realm of creative advocacy to be frivolous or vexatious. In fact, the

irony here is that plaintiffs' counsel may well have been wrong about conceding that the claims lacked merit.

First, counsel conceded that "'Vice did not act under "color of state law"concerning the extortion letter,'" because the letter "was sent anonymously." P.A. 3a (quoting counsel's concession at J.A. 169). That concession is at least debatable—and almost certainly wrong. State officials are frequently found liable under § 1983 for constitutional violations they commit secretly. *See, e.g., Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994) (rejecting defendants' argument that acts that are "anonymous" "cannot provide the basis for a suit under 42 U.S.C. § 1983"). For § 1983 purposes, what matters is that Chief Vice "us[ed] his official power as a means to achieve his private aim" of gathering the dirt he included in his letter. *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 464-65 (5th Cir. 2010). And beyond his abuse of authority to draft that letter, Chief Vice certainly used his official power as Chief of Police when he Shanghaied a prisoner and used police personnel and police resources to execute his plot.

Second, counsel conceded that Mr. Fox had no § 1983 claim because "'Fox was not prevented from running for election.'" P.A. 3a (quoting counsel's concession at J.A. 170). That does not necessarily mean that Chief Vice was not violating any constitutional right. Surely, there is an argument that the state may not constitutionally use its ample resources and authority to try to skew an election in favor of an incumbent or to skew the candidate's "speech of [his] qualifications ... for public office." *Republican Party of Minnesota v. White*, 536 U.S.

765, 774 (2002). There is an argument that the state violates the First Amendment when it tries to interfere with a candidate's right to run for office by distracting the candidate with false criminal complaints and forcing him to fend off false allegations. *Cf. Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977) ("[P]laintiff's interest in running for [office] and thereby expressing his political views without interference from state officials who wished to discourage the expression of those views lies at the core of the values protected by the First Amendment."). Just as a speaker does not have to be completely silenced in order to sue for state interference with his right to speak, a candidate does not have to withdraw from the race or stop speaking about his candidacy to sue for state interference with his right to run for office and advocate his qualifications. *Cf. White*, 536 U.S. at 774 (regulation of candidate speech is unconstitutional even though candidate is not silenced); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 195 (1999) (regulation of petition circulators "imposes a burden on political expression that the State has failed to justify," even though petitioning is not prohibited outright).

These legal theories may foster scholarly debate. This Court might ultimately deem these arguments wrong or "without merit," P.A. 27a—which is all the courts below actually found.[4] But that does not

[4] Both the magistrate and the court of appeals awarded fees under the Fifth Circuit's rule, which deems a claim "frivolous" based upon three factors: "(1) whether the plaintiff established a prima facie case, (2) whether the defendant offered to settle, and (3) whether the court held a full trial." P.A. 7a (citing *Myers v. City of West Monroe*, 211 F.3d 289, 292 (5th Cir.

make them frivolous. As this Court has held "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone," vexatious or frivolous. *Hughes*, 449 U.S. at 15-16 (summarily reversing fee award where the prisoner's complaint was dismissed for failure to state a claim, which means it would not, under any circumstance, make out a constitutional violation).

Maybe some courts would not commit the same errors as the courts below. Maybe most would be able to "resist the understandable temptation to engage in *post hoc* reasoning." *Christiansburg*, 434 U.S. at 421-22. Even so, no plaintiff can ever know in advance whether he will be the victim of that temptation. When put to the choice between financial ruin and advancing the public interest with a creative federal theory, most plaintiffs would think twice before proceeding with the claim. This uncertainty would "substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement" of the civil rights laws. *Id.* at 422.

2000)). The magistrate set an even lower standard, awarding fees after finding that Mr. Fox's federal claim was "vexatious, frivolous, or *otherwise without merit*," P.A. 27a (emphasis added). To conclude that the claim was "frivolous" because counsel's theory was legally incorrect—that "Fox failed to establish any prima facie federal claim," P.A. 8a—is a far cry from determining the claim to be outside the realm of permissible advocacy and frivolous on its face.

3. The court of appeals' rule will yield perverse incentives and multiply litigation.

Dangling the prospect of attorneys' fees before prevailing defendants will put all the incentives and burdens for all participants—the lawyers, the clients, and the defendants—in the wrong place and multiply litigation.

Lawyers. What counsel did here is common, desirable, and commendable. They pled the claims they thought they might plausibly be able to prove. Counsel necessarily have to be expansive, because they often do not know what they will be able to prove or how the law will evolve as their case wends its way through the courts. Then, once discovery was complete, they culled their claims. A lawyer might decide to abandon a federal claim for any number of reasons. She might wish to return to state court (where this case was first filed). She might conclude that state law could provide all the appropriate relief without the distraction and expense of litigating a federal claim. She might want to gain credibility with the judge. She might have determined through discovery that the allegations—however legitimate—could not be proven. She might wish simply to streamline the case so as to avoid confusing the jury.

Such judgments are obviously valid and desirable. They conserve judicial resources, focus the parties' attention, and simplify the jury's job.

If a client can be punished because his lawyer decides to jettison a federal claim before trial, lawyers will stop making those judgments. The result will be

needless litigation, more complicated cases, busier courts, and more confused juries.

Clients. Just as there is something deeply troubling about punishing a client for his lawyer's candor, there is also something deeply troubling about punishing the client for his lawyer's choice of legal theory.

A client should be liable for fees where a particular claim in a complaint is founded on "extravagant charges ... that *lack[] a substantial basis in fact.*" *Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (Powell, J. concurring in part and dissenting in part). It is sensible to hold the client accountable for the facts asserted in his pleadings. After all, those facts often come from the client himself, and his lawyers will not have independent knowledge of their truth or falsity at the outset.

The situation is different—and the court's response should be as well—if the facts are true and the defendant contests the *legal theory* applied to those facts. It is the lawyer's job, not the client's, to map the facts onto the right legal theory, and it would be unfair to punish clients for the choices made by their lawyer.

This case illustrates the point vividly. Mr. Fox did his job: He recounted the facts he witnessed, turned over the documents he had, and relied on the outcome of an FBI investigation. No one disputes that he had a substantial basis for believing Chief Vice wronged him; a jury found as much beyond a reasonable doubt based on these same facts. When his lawyers heard the story and declared, "That's defamation, and it's unconstitutional to boot," he had

no basis on which to second-guess their judgment. Nothing in the law or common sense required him to say, "No, we cannot file a claim under 42 U.S.C. § 1983 because there is no deprivation of a constitutional right if a state official tries to block me from running for office, but fails." Only the rarest of plaintiffs would have the sophistication, education, or confidence to cross-examine his lawyers: "How can you say that Chief Vice was acting under color of state law when he wrote an anonymous letter? I think it's frivolous to say that he acted under color of state law when he identified himself as a police chief and directed a conspiracy involving his police officers and a prisoner in his custody." Just as "[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims," *Hughes*, 449 U.S. at 15, a represented litigant should not be punished for failure to override counsel's legal or tactical judgments.

The court of appeals worried that "it would undermine the intent of Congress to allow plaintiffs to prosecute frivolous claims without consequences merely because those claims were joined with additional non-frivolous claims." P.A. 10a. But there *are* "consequences" for pressing frivolous claims—Rule 11 sanctions. And for at least two reasons, Rule 11 is a much more suitable vehicle for addressing these concerns when a frivolous federal claim is factually intertwined with other viable claims.

First, Rule 11 places the onus where it belongs, enshrining the common-sense principle suggested above that clients are not held responsible for their counsel's legal judgments. Rule 11 sanctions are assessed against the client, rather than counsel, only

in limited circumstances: when filings are "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," Fed. R. Civ. P. 11(b)(1), or when they present "factual contentions" lacking in "evidentiary support," *id.* 11(b)(3), or false "denials of factual contentions," *id.* 11(b)(4). But "[t]he court must not impose a monetary sanction ... against a represented party for violating Rule 11(b)(2)," *id.* 11(c)(5)(A), which prohibits a lawyer from "presenting to the court a pleading" where "the claims, defenses, and other legal contentions" are not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." *Id.* 11(b)(2); *see id.* 11(c)(5).

Second, Rule 11 prohibits sanctions "if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service" of the sanctions motion. *Id.* 11(c)(2). This safe harbor gives the plaintiff an opportunity to evaluate the financial risk of proceeding with a claim without the chilling effect of a potential attorneys' fee motion being made after a claim is dismissed.

Defendants. The court of appeals' approach also gives perverse incentives to defendants in at least two ways.

First, under a rational regime, defendants should be encouraged to eliminate frivolous federal claims early. But the court of appeals' rule rewards defendants for holding back dispositive motions and keeping the meter running in hopes of recovering fees for work that would have to be done anyway.

Again, this case illustrates the danger. If Defendants wasted any effort in connection with the federal claim, they have only themselves to blame. If, as they contend, the claim was frivolous from the start, then they should have moved to dismiss it from the start—not after they had amassed fees of over $50,000 in discovery.

Second, if fees are available whenever a defendant succeeds in getting a claim dismissed, defendants will seek fees every time. Where the dismissed claims are factually intertwined with the surviving claims, the fee litigation will be especially time-consuming. Parties and courts will spend countless hours parsing time entries and bickering over how much of each entry is properly allocable to the federal claims. And the task will be doubly difficult if this Court were to adopt a rule for defendants that parallels the rule for plaintiffs, in which compensation depends on "degree of success obtained" by the defendant, *Hensley*, 461 U.S. at 436, "in comparison to the scope of the litigation as a whole," *id.* at 440. It is hard enough to make that determination when a litigation is over; it is downright impossible to assess the defendant's success where, as here, the case is still proceeding and the defendant still stands to lose everything under state law that he could have lost under the federal law.

Already, litigation over fee awards "must be one of the least socially productive types of litigation imaginable." *Id.* at 442 (Brennan, J., concurring in part and dissenting in part). It is even less productive to figure out how much money a convicted felon should receive, in the middle of active litigation

against him, when only one of several intertwined claims against him was dismissed.

II. THE MAGISTRATE ERRED IN AWARDING DEFENDANTS ALL THEIR FEES WITHOUT SEGREGATING THE FEES THAT WERE ATTRIBUTABLE EXCLUSIVELY TO THE DISMISSED CLAIM.

Even if Defendants were entitled to some fees, the courts below erred in awarding every penny they incurred in defending the entire two-year litigation.

The court of appeals and the magistrate judge articulated two diametrically opposite legal rules on apportioning fees where a purportedly frivolous claim is factually interwoven with other, surviving claims. The magistrate held that: "Normally, a party seeking attorney's fees must segregate successful claims from unsuccessful claims; however, where various claims 'arose out of the same transaction and were so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts,' no segregation is necessarily required." P.A. 28a (quoting *United States for Varco Pruden Bldgs. v. Reid & Gary Strickland Co.*, 161 F.3d 915, 919 (5th Cir. 1998)). In contrast, the court of appeals held that the most a defendant should ever be allowed to recover is the amount of "attorneys' fees for work which can be distinctly traced to a plaintiff's frivolous claims." P.A. 11a.

The court of appeals stated the correct rule: A defendant should recover, at most, fees directly and exclusively attributable to a frivolous claim—fees

that would not have been incurred but for the inclusion of the claim. *See infra* Point II.A. But the court of appeals misapplied the rule, essentially transforming it into the magistrate's incorrect one. *See infra* Point II.B.

A. The Most That Defendants Could Collect Are Fees Directly Attributable to the Dismissed Claim.

The touchstone, as before, is Congress's limited objective in allowing an award of fees to a prevailing defendant: "to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420 (emphasis added); *see supra* at 28-30. This objective justifies nothing more than compensation for the incremental burden occasioned by the frivolous claim. Any work that defense counsel would have had to do anyway cannot be the result of the frivolous claim. As the panel dissent recognized, *see* P.A. 15a-16a, anything more would grant Defendants an unfair windfall far out of proportion to any harm they suffered—a result that this Court has held is antithetical to § 1988. *See Blum v. Stenson*, 465 U.S. 886, 893-95 (1984) (holding that Congress "expressly intended to prohibit" "windfall profits") (internal quotation marks omitted). "The only fees Fox should be required to pay"—if he is required to pay any at all—"are those solely applicable to his federal claims." P.A. 17a.

The magistrate got it exactly backwards when she declared that "'no segregation is necessarily required'" when "various claims 'arose out of the same transaction.'" P.A. 28a (citation omitted). She started with the right premise: When claims are as

"interrelated" as these claims were, "'their prosecution or defense entail[s] proof or denial of essentially the same facts.'" *Id.* (citation omitted). But the factual interrelatedness is an argument for *declining* to award fees that would have been incurred anyway, not an argument for *awarding* them.

In holding otherwise, the district court cited just one case—involving a Texas debt collection statute. *See Varco*, 161 F.3d at 919 (interpreting Tex. Civ. Prac. & Rem. Code Ann. § 38.001). But the standards for awarding attorneys' fees under a federal statute are a matter of federal, not state, law. *See, e.g., Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 198 (1988); 28 U.S.C. § 1652. It was especially inappropriate to import the standards from a state law directed at awarding fees to *plaintiffs*. As this Court has recognized, even the *federal* law governing when a prevailing plaintiff can collect attorneys' fees cannot be uncritically applied to prevailing defendants. *See supra* at 28-30 (discussing the asymmetry this Court has implemented); P.A. 15a (panel dissent makes this distinction).

Here, Defendants have managed to defeat only one claim—on purely legal grounds—but still stand to be held fully liable on any of the several remaining viable common law theories. Even a plaintiff in this situation would not be awarded all attorneys' fees incurred. As this Court has recognized, compensating a plaintiff for every hour expended on the entire litigation when he or she prevails on only one of several intertwined claims would often yield "an excessive amount." *Hensley*, 461 U.S. at 436. When it comes to fees for a plaintiff's partial success, "the most critical factor is the degree of success obtained,"

id. at 436; "[t]he result is what matters," *id.* at 435. For plaintiffs, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*

If this Court were to apply the allocation principle it applies to plaintiffs, Defendants here would collect nothing—at least not yet. Even with the voluntary dismissal of the federal claim, Defendants still had a lot to lose; they still faced the prospect of a hefty damages award on the extortion claim, the defamation claim, and the claim for intentional infliction of emotional distress. If they do eventually lose any of those claims, their "success" on the federal claim will be of only trivial historic interest. In fact, under the *Hensley* test, a court could not even assess Defendants' success on the federal claim until the end of the litigation, for only then could the court determine how Defendants fared "overall." *Id.*

All that said, the central point remains: Just as it is senseless to apply the rules for awarding attorneys' fees to a plaintiff when considering an award to a defendant, it is equally senseless to import the allocation rules from one context to the other. In each context, "[a] successful defendant seeking counsel fees ... must rely on quite different equitable considerations." *Christiansburg*, 434 U.S. at 419. For plaintiffs, the equities are all about encouraging lawsuits and righting constitutional wrongs; for defendants, the equities are all about avoiding the additional incremental burden imposed by frivolous litigation.

B. The Court of Appeals Erred in Applying the Standard.

Although the court of appeals announced the correct rule, it promptly eviscerated the rule by adopting most of the magistrate's flawed rationale for awarding every penny of fees to Defendants. P.A. 12a (summarizing P.A. 32a-33a).

The magistrate began by mischaracterizing the complaint as purely federal: "The court finds that plaintiff failed to allege state law violations in the Complaint such that defendants were adequately noticed that a separate defense as to these claims would need to be prepared at the beginning of the litigation." P.A. 32a. To the contrary, the state law claims were featured prominently in the complaint. The complaint alleged certain facts that could only be viewed as supporting state law causes of action. It alleged, for example, that the "offense report that was prepared against petitioner was totally false in its allegations and was made with malice on the part of Billy Ray Vice, Arthur Phillips, and Troy Cary," J.A. 42—the classic formulation of a defamation claim. It listed numerous "rights, privileges and Immunities afforded" to Mr. Fox, not just by "our Constitution" but also by various other "laws that were violated." Among them were: (1) "the right to not be slandered/defamed"; and (2) "the right to be free from extortion." J.A. 41. It further invoked principles of "vicarious liability on the part of the Town of Vinton," which could only apply to the state law claims, since that is not a viable theory under § 1983. J.A. 38, 40. *See Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978) ("[A] municipality cannot be held liable under § 1983 on a

respondeat superior theory."); *Lamkin v. Brooks*, 498 So. 2d 1068, 1071-72 (La. 1986) (applying Louisiana law and finding town vicariously liable for the tort of its police officer).

True, the complaint did not set forth independent counts for each claim as federal judges are accustomed to seeing. But that is because this complaint was prepared for state court, not federal court, and that form of pleading is not required under Louisiana law. In Louisiana, plaintiffs do not allege the "'theory of the case' ... as a pleading requirement or restriction." *Cox v. W.M. Heroman & Co.*, 298 So. 2d 848, 855 (La. 1974) (overruled on other grounds, *A. Copeland Enters., Inc. v. Slidell Mem. Hosp.*, 657 So. 2d 1292 (La. 1995)). "So long as the [f]acts constituting the claim or defense are alleged or proved, the party may be granted any relief to which he is entitled under the fact-pleadings and evidence." *Id.* There is no dispute that the "fact-pleadings" supported claims for various state law torts, including extortion, intentional infliction of emotional distress, and defamation.

The court of appeals evidently did not embrace the magistrate's view of the complaint. The panel majority acknowledged that the complaint, from the start, "claim[ed] federal and state causes of action." P.A. 3a. However, the majority appears to have adopted the magistrate's next observation, "that, throughout the litigation, the focus of both plaintiff and defendants was plaintiff's § 1983 claim." P.A. 33a (quoted at P.A. 12a) (emphasis added).

Neither the panel majority nor the magistrate explained how they reached that conclusion. The

single sentence falls far short of satisfying this Court's direction that the district court must "provide a concise but clear explanation of the reasons for the fee award." *Hensley*, 461 U.S. at 437; *see id.* at 438-39 (vacating judgment because district court failed to provide sufficient explanation). The magistrate did not cite a single document to support her conclusion. That may be because she had not presided over any of the prior proceedings. The truth is that Defendants were always keenly aware of the independent force of all the state law claims. The answers filed by each of the three individuals vouched compliance with state law and interposed several defenses to state law claims. J.A. 50, 66, 75. Moreover, Mr. Fox filed a motion for partial summary judgment on his state law extortion claim, and defendants responded to it as a matter of state law. J.A. 122-23.

In any event, as the dissent by Judge Southwick noted, the decision cannot turn upon what legal theories most occupied Defendants' minds as they were conducting discovery. P.A. 17a (dissent notes that "[t]hat finding does not affect my view that any fee for services by Vice's counsel that was also necessary for the state claims is not recoverable, no matter what the focus of counsel might have been"). What matters is that the federal claim did not impose any more of a litigation burden on Defendants than they would have had to endure if only state law claims had been pled. *See supra* at 31-33 (explaining litigation burden). What matters is the finding of the original magistrate—who did preside over the previous proceedings—that "[a]ny trial preparation, legal research, and discovery" that Defendants con-

ducted to that point "may be used by the parties in the state court proceedings." P.A. 40a; *see also* P.A. 16a.

Beyond that, the only other justification the magistrate offered was the non sequitur (also echoed by the court of appeals) that "defendants' request for attorney's fees relates only to proceedings before this court," and "Defendants do not appear to request attorney's fees related to the defense of the state law claims [that were] remanded." P.A. 33a (quoted at P.A. 12a). The premise was correct—at the time of the fee request, the case had been pending exclusively in federal court—but irrelevant. An award of attorneys' fees depends on what transpired in the litigation, not which court was presiding. Whatever the courthouse, Defendants are not entitled to attorneys' fees without demonstrating that those fees were directly and exclusively attributable to the dismissed federal claim. Defendants have fallen far short of satisfying that burden.

All of the arguments presented above about the dangers of allowing a defendant to recover *some* fees for prevailing on a factually intertwined claim are magnified many times over if courts are authorized to grant *all* the fees, even those that the defendant would have incurred anyway. *See supra* at 31-47. Congress passed § 1988 and other similar statutes to encourage plaintiffs to enforce federal law and to ensure that defendants get compensated fairly for litigation burdens to which they should never have been subjected. An affirmance of the fee award here will only encourage plaintiffs to drop federal claims from their suits, to the detriment of the public good, and bestow windfall recoveries on wicked and ma-

leficent defendants just because they were able to show that their deeds, however wrongful and illegal, did not violate *federal* law.

CONCLUSION

The judgment of the court of appeals should be reversed and the fee award should be vacated.

Respectfully submitted,

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December 23, 2010

RESPONDENT'S BRIEF

No. 10-114

In the Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE and THE TOWN OF VINTON, LOUISIANA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

This case arises from petitioner's lawsuit alleging violations of 42 U.S.C. § 1983. After nearly two years of litigation and discovery by the parties, petitioner conceded that he could not support his Section 1983 claims. The district court then dismissed all of the federal claims with prejudice and further concluded that they were frivolous. The district court determined that some of plaintiff's allegations "could be characterized as state law tort claims," Pet. App. 32a, and remanded the case to state court, where it remains pending. The district court ultimately awarded respondents attorney's fees under 42 U.S.C. § 1988(b) for their work defending the frivolous Section 1983 claims. The court of appeals affirmed.

The questions this Court granted certiorari to review are:

1. Can defendants be awarded attorney's fees under 42 U.S.C. § 1988(b) in an action based on a dismissal of a claim, where the plaintiff has asserted other interrelated and nonfrivolous claims?

2. Is it improper to award defendants all of the attorney's fees they incurred in an action under 42 U.S.C. § 1988(b), where the fees were spent defending nonfrivolous claims that were intertwined with the frivolous claim?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES v

STATEMENT 1

Statutory Background 1

The Election Campaign 3

District Court Proceedings 4

Court of Appeals Proceedings 10

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. Plaintiffs Who Bring Frivolous Section 1983 Claims Gain No Categorical Immunity From Fee Awards Simply By Including A Nonfrivolous And Factually Related Claim 16

A. Text And Precedent Establish That A District Court Has Discretion To Award Fees To Any Defendant Who Prevails On A Frivolous Section 1983 Claim 18

B. Section 1988's Legislative History Does Not Support Petitioner 22

C. Permitting Fees Against Any Plaintiff Who Brings A Frivolous Section 1983 Claim Appropriately Balances The Purposes Of The Fee-Shifting Statute 24

TABLE OF CONTENTS cont'd

Page

1. Permitting Fees For Frivolous Section 1983 Claims Will Not Discourage Meritorious Ones 25

2. Petitioner's Proposed Rule Would Encourage Frivolous Section 1983 Claims 32

II. The District Court's Judgment Should Be Affirmed 41

A. A District Court Has Discretion To Award Fees For Work Directly Traceable To A Frivolous Section 1983 Claim, Even If Some Portion Of That Work Also Is Traceable To Nonfrivolous State Tort Claims 42

B. In Any Event, The Lower Courts Correctly Held That The Fees Awarded Here Were Traceable Exclusively To The Frivolous Section 1983 Claims 44

III. If The Judgment Below Is Not Affirmed Outright, The Writ Of Certiorari Should Be Dismissed As Improvidently Granted 48

A. Dismissal Is Warranted Because Petitioner Now Disputes The Premise Of Frivolousness On Which Certiorari Was Granted 49

TABLE OF CONTENTS cont'd

Page

B. Dismissal Is Warranted Because Petitioner Now Asserts That The Fifth Circuit "Stated The Correct Rule" About Calculating A Fee Award To A Prevailing Defendant 53

CONCLUSION 56

TABLE OF AUTHORITIES

Cases **Page(s)**

Adarand Constructors, Inc. v. *Mineta*,
534 U.S. 103 (2001) 31

Albemarle Paper Co. v. *Moody*,
422 U.S. 405 (1975) 43

Allen v. *McCurry*,
449 U.S. 90 (1980) 6

Astrue v. *Ratliff*,
130 S. Ct. 2521 (2010) 39

Barnes Found. v. *Township of Lower Merion*,
242 F.3d 151 (3d Cir. 2001) 27

Blue v. *Dep't of the Army*,
914 F.2d 525 (4th Cir. 1990) 34

Blum v. *Stenson*,
465 U.S. 886 (1984) 43

Board of Comm'rs of Bryan Cnty. v. *Brown*,
520 U.S. 397 (1997) 38

Bonner v. *Mobile Energy Servs. Co.*,
246 F.3d 1303 (11th Cir. 2001) 30

Buckhannon Bd. and Care Home, Inc. v. *West Va. Dept. of Health & Human Res.*,
532 U.S. 598 (2001) 31

Business Guides, Inc. v. *Chromatic Communications Enters.*,
498 U.S. 533 (1991) 40

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535 F.2d 722 (2d Cir. 1976) 24

TABLE OF AUTHORITIES cont'd

Page(s)

Christiansburg Garment Co. v. *EEOC*,
434 U.S. 412 (1978) ..... *passim*

City of Riverside v. *Rivera*,
477 U.S. 561 (1986) 22, 36, 43

Cooter & Gell v. *Hartmax Corp.*,
496 U.S. 384 (1990) 37, 40

Durrett v. *Jenkins Brickyard, Inc.*,
678 F.2d 911 (11th Cir. 1982) 39

Foster v. *Mydas Assocs.*,
943 F.2d 139 (1st Cir. 1991) 34

Garcia v. *United States*,
469 U.S. 70 (1984) 24

Harlow v. *Fitzgerald*,
457 U.S. 800 (1982) 33

Hensley v. *Eckerhart*,
461 U.S. 424 (1983) ..... *passim*

Hughes v. *Rowe*,
449 U.S. 5 (1980) ..... *passim*

Hutchinson v. *Staton*,
994 F.2d 1076 (4th Cir. 1993) 23

Independent Fed'n of Flight Attendants v. *Zipes*,
491 U.S. 754 (1989) 30

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*,
510 U.S. 27 (1993) 32, 34

TABLE OF AUTHORITIES cont'd

Page(s)

Jane L. v. *Bangerter*,
61 F.3d 1505 (10th Cir. 1995) 27

Jones v. *Bock*,
549 U.S. 199 (2007) 33

Khan v. *Gallitano*,
180 F.3d 829 (7th Cir. 1999) 26, 27

Lamboy-Ortiz v. *Ortiz-Velez*,
No. 09-1649, 2010 WL 5129824
(1st Cir. Dec. 17, 2010) 23

Lambrix v. *Singletary*,
520 U.S. 518 (1997) 30

Lowery v. *Jefferson Cnty.*
Bd. of Educ. (6th Cir. 2009),
586 F.3d 427 30

Martinez v. *Colon*,
54 F.3d 980 (1st Cir. 1995) 38

Mazer v. *Stein*,
347 U.S. 201 (1954) 30

Monell v. *New York City*
Dep't of Social Servs.,
436 U.S. 658 (1978) 28, 33, 36

Munson v. *Milwaukee Bd. of Sch. Dirs.*,
969 F.2d 266 (7th Cir. 1992) 34

Myers v. *City of W. Monroe*,
211 F.3d 289 (5th Cir. 2000) 28

Newman v. *Piggie Park Enters.*,
390 U.S. 400 (1968) 1, 19, 40

TABLE OF AUTHORITIES cont'd

Page(s)

Norfolk Southern Ry. v. Sorrell,
549 U.S. 158 (2007) 32

Owen v. City of Independence,
445 U.S. 622 (1980) 33

Perdue v. Kenny A.,
130 S. Ct. 1662 (2010) 2

Plessy v. Ferguson,
163 U.S. 537 (1896) 28

Preiser v. Rodriguez,
411 U.S. 475 (1973) 33

Ruddle v. Egensperger,
266 F.3d 542 (6th Cir. 2001) 26

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980) 39

Robles v. Prince George's Cty.,
302 F.3d 262 (4th Cir. 2002) 22

Rodriguez v. United States,
480 U.S. 522 (1987) 32

Roma Constr., Co. v. Russo,
96 F.3d 566 (1st Cir. 1996) 6

Screws v. United States,
325 U.S. 91 (1945) 36

Susta v. CDC Ixis N. Am.,
443 F.3d 161 (2d Cir. 2006) 25

Smith v. Wade,
461 U.S. 30 (1983) 44

TABLE OF AUTHORITIES cont'd

Page(s)

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493 U.S. 265 (1990) 33

State v. *Vice*, No. 08-233, 2008 WL 5169933
(La. Ct. App. Dec. 10, 2008) 5

Tancredi v. *Metropolitan Life Ins. Co.*,
378 F.3d 220 (2d Cir. 2004) 26, 27

Tarter v. *Raybuck*,
742 F.2d 977 (6th Cir. 1984) 27

U.S. for Vavco Pruden Bldgs. v. *Reid & Gary Strickland Co.*,
161 F.3d 915 (5th Cir. 1998) 12

Ward v. *Hickey*,
996 F.2d 448 (1st Cir. 1993) 34

West v. *Atkins*,
487 U.S. 42 (1988) 38

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42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988(b) ..... *passim*

42 U.S.C. § 1997(e) *et seq.* 33

Fed. R. Civ. P. 11 ..... 39, 40

Fed. R. Civ. P. 11(b)(2) 27

S. Ct. R. 10 30

S. Ct. R. 14.1(a) 30

S. Ct. R. 24.1(a) 34

TABLE OF AUTHORITIES cont'd

Page(s)

Other Authorities

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BRIEF FOR THE RESPONDENTS

STATEMENT

Section 1988(b) of Title 42 authorizes district courts to award "a reasonable attorney's fee" to "prevailing part[ies]" in actions brought under 42 U.S.C. § 1983. It is undisputed that respondents are "prevailing" parties. The district court so found, the court of appeals affirmed, and petitioner has not challenged that holding. It is likewise undisputed that petitioner's Section 1983 claims were frivolous. The district court so found, the court of appeals affirmed, and petitioner acknowledges he did not seek review of that determination. It is also (now) undisputed that the court of appeals held that respondents could recover only fees "distinctly" and "exclusively" traceable to the frivolous Section 1983 claims. The question here is whether the fee award was nonetheless improper because petitioner claims to have asserted other, nonfrivolous claims as part of his lawsuit that were factually related to his frivolous Section 1983 claims.

Statutory Background

The basic standards for evaluating whether a prevailing party is eligible for fees under Section 1988 have been settled for nearly three decades. A successful *plaintiff* should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). A plaintiff need not win the entire lawsuit to be considered "prevailing"; it is sufficient that he succeeds on "any significant issue in litigation which achieves some of

the benefit [he] sought in bringing suit." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotation marks omitted). In contrast, a *defendant* may not recover fees unless the "plaintiff's action [is] frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978); accord *Hughes* v. *Rowe*, 449 U.S. 5, 15 (1980) (per curiam) (applying *Christiansburg* standard to Section 1988). The statute thus strikes a deliberate balance between "giving the private plaintiff substantial incentives to sue" and discouraging "frivolous" claims. *Christiansburg*, 434 U.S. at 419.

Once a party has crossed this "statutory threshold * * * [i]t remains for the district court to determine what fee is 'reasonable.'" *Hensley*, 461 U.S. at 433. The district court "necessarily has discretion in making this equitable judgment," given its "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* at 437; see *Perdue* v. *Kenny A.*, 130 S. Ct. 1662, 1679 (2010) (Breyer, J., concurring in part and dissenting in part) ("[O]ur tiered and functionally specialized judicial system places the task of determining an attorney's fee award primarily in the district court's hands.").

District court discretion plays a particularly important role in determining an appropriate fee in cases involving successful and unsuccessful claims that share a "common core of facts" or are "based on related legal theories." *Hensley*, 461 U.S. at 435. Where a plaintiff brings a successful Section 1983 claim along with related unsuccessful claims, a court may award fees for time reasonably spent on both sets of claims, subject to an adjustment based on "the degree of success obtained," among other consider-

ations. *Id.* at 435-437. "There is no precise rule or formula." *Id.* at 436. But where a plaintiff obtains "excellent results, his attorney should recover a fully compensatory fee" that "[n]ormally * * * will encompass all hours reasonably expended on the litigation." *Id.* at 435.

This case turns on whether the same standard applies to prevailing defendants. That is, once a district court has determined that a plaintiff's Section 1983 claims are "frivolous, unreasonable, or without foundation," *Christiansburg*, 434 U.S. at 421, is it within the district court's discretion to award fees where the plaintiff also asserted at least one related, nonfrivolous claim?

The Election Campaign

This case arises out of a political campaign for Chief of Police in the Town of Vinton, Louisiana (Town) between petitioner Ricky D. Fox and respondent Billy Ray Vice. J.A. 37-43. Petitioner alleged that Vice, the incumbent Chief, mailed an anonymous letter threatening to reveal information about petitioner's checkered tenure as a state trooper to a local newspaper. J.A. 33-36, 39. The letter noted, for example, that petitioner had been disciplined for sexually harassing female coworkers and suspended for engaging in illegal hunting activities. J.A. 33-34. Petitioner also alleged that Vice arranged for a third party to confront petitioner at a basketball game, accuse him of uttering a racial slur, and file a police report relating to the confrontation. J.A. 39-40. Petitioner ultimately won the election and replaced Vice as Chief. J.A. 145.

District Court Proceedings

In 2005, petitioner sued Vice, the Town, Troy Cary, and Arthur Phillips in Louisiana state court.[1] J.A. 37-43. The complaint alleged that the defendants "are liable under 42 U.S.C.S. § 1983, which protects petitioner's rights, privileges and immunities as secured by our Constitution and laws." J.A. 40-41. It then identified those constitutional rights as:

> a) to seek public office[;]
> b) to be free from extortion;
> c) to be protected by [sic] unlawful interference by police;
> d) to be protected by [sic] malicious abuse of process;
> e) to not be slandered/defamed;
> f) to Due Process;
> g) to not be subjected to abuse of power; and
> h) other violations to be proven at the trial of this matter.

J.A. 41. The complaint did not expressly allege any state-law cause of action. As the district court later found, "plaintiff made certain allegations that could be characterized as state law tort claims, but plaintiff did not make these allegations separate from his § 1983" claims. Pet. App. 32a.[2] Petitioner also filed a motion seeking to attach Vice's real property, in-

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[1] For purposes of this brief, respondents assume but do not concede that Fox named Vice as a defendant in both his individual and official capacities.

[2] By consent of the parties, the federal district court proceedings were conducted by a magistrate judge. Pet. 1 n.1. Unless otherwise indicated, this brief uses the term "district court" to refer to all such proceedings.

cluding his home and auto parts store. Mot. for Writ of Attachment, *Fox* v. *Vice*, No. 2005-5932 (La. Dist. Ct., Calcasieu Parish, Jan. 11, 2006). That motion described Fox's claims as alleging "violat[ions of his] civil rights, privileges, and immunities afforded * * * by our Constitution," but made no mention of any state-law claims. *Id.* at 1.

Respondents removed to federal court based on the Section 1983 claims. J.A. 44-48. Respondents then filed answers, contending, among other things, that petitioner had "fail[ed] to state a claim." J.A. 63, 70. Respondents asserted Section 1983 immunity defenses, as well as state-law limitations of liability. J.A. 66-70, 73-75. Respondents additionally pleaded the right to recover attorney's fees under Section 1988. J.A. 69, 75.[3]

Over the next several months, the parties proceeded with discovery while awaiting the outcome of a criminal prosecution against Vice.[4] See, *e.g.*, J.A. 220, 271, 300, 316. Meanwhile, petitioner aggressively pursued his Section 1983 claims, even as respondents repeatedly countered that the claims were groundless. In August 2006, counsel for the Town warned petitioner that he could not make out a

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[3] The district court granted petitioner's motion to dismiss his claims against Phillips early in the proceedings. J.A. 87-88. Cary did not present evidence of attorney's fees and did not appear before the court of appeals. References to "defendants" are thus to Vice and the Town.

[4] Vice ultimately was convicted of extortion in connection with the anonymous letter, and his conviction was later affirmed. *State* v. *Vice*, No. 08-255, 2008 WL 5169955 (La. Ct. App. Dec. 10, 2008). Vice died on August 26, 2010.

Section 1983 claim against the Town because "[t]here are no facts that show that plaintiff was damaged by any policy or custom." J.A. 200-201. But in November 2006, counsel for petitioner refused to relent, arguing that Vice's alleged misconduct constituted "official policy" because Vice was Chief of Police and that Vice could not assert qualified immunity as a defense to the Section 1983 claims. J.A. 217-219. These letters contained no mention of any state tort claims.

In January 2007, petitioner began pressuring respondents to settle the Section 1983 claims. "This case has been close to the 'back burner' for long enough," petitioner's counsel wrote. J.A. 202. Petitioner's counsel threatened to "put together [his] liability motion" unless respondents participated in mediation discussions. J.A. 203. Two months later, he turned up the heat: "Fox sat through the depositions the other day, and now I believe his anger, and accordingly, his expectations have risen. I believe it would be best for all of us * * * to get this matter resolved." J.A. 208. In April 2007, counsel argued in a letter to the Town that Vice's criminal conviction would support summary judgment "in our federal civil proceedings" and that "if your client is serious about getting this case resolved, circumstances are not likely to improve beyond this point." J.A. 209-210.

After respondents declined to yield, petitioner sought summary judgment, arguing that Vice's extortion conviction conclusively determined the Section 1983 claims. J.A. 77-81 (citing *Allen* v. *McCurry*, 449 U.S. 90 (1980)). Petitioner also asserted that the Town was vicariously liable for Vice's actions under Section 1983's "unconstitutional policy or custom" standard. J.A. 81-83 (citing *Roma Constr. Co.* v. *Russo*, 96 F.3d 566 (1st Cir. 1996)). Petitioner's

motion did not explain, however, how Vice's alleged actions amounted to a custom or policy of the Town, offering only the conclusory statement that "it seems clear Vice was acting in the area of authority of the Chief of Police when he threatened Fox with the anonymous letter." J.A. 83. Vice's response disputed the Section 1983 claims, but did not address any state-law claims. J.A. 89-103. The Town's response likewise challenged the Section 1983 claims, and it further declared that "[p]laintiff does not specifically set forth any state law claim in his" complaint. J.A. 104, 122.

Petitioner filed his reply memorandum on August 24, 2007, conceding—twenty months after filing his complaint—that he had "presented insufficient evidence" to support his Section 1983 claims against the Town. J.A. 126. Petitioner withdrew only his motion for summary judgment, not the underlying Section 1983 claims. J.A. 126-127 ("Plaintiff hopes to re-urge the motion against the Town of Vinton once additional discovery has been conducted."). As to Vice, petitioner claimed that "it is not necessary to show that Vice was acting under 'color of state law,'" because "[t]he simple act of extortion is sufficient." J.A. 125. In contrast to his concession regarding the Town, petitioner did not disavow his Section 1983 claims against Vice; rather, he asked the court to "hold the matter in abeyance" until Vice's conviction became final on appeal. *Ibid.* Petitioner also stated that the alleged extortion by Vice constituted a "civil wrong subject to tort liability and damages," citing a Louisiana state court decision. J.A. 126.

Respondents then moved for summary judgment. J.A. 128-167. In response, petitioner conceded that his "civil rights claims predicated on 42 U.S.C.

§ 1983" as to all defendants were not "valid" and that "defendants' motion to dismiss Fox's civil rights claims * * * should be granted." J.A. 168-169, 175. More particularly, petitioner conceded that "Vice did not act under 'color of law' concerning the extortion letter" because "it was sent anonymously." J.A. 169. "As to the fabricated basketball game incident," petitioner stated, "Fox cannot show a deprivation of a right, privilege or immunity secured by the United States Constitution and laws" because "Fox was not prevented from running for election." J.A. 169-170. Moreover, petitioner continued, "the defamation Fox suffered as a result of this fabrication [is not] deprivation of a property right." J.A. 170. Fox asserted, however, that his "remaining claims, based upon state tort law, should be maintained." J.A. 168-169.

The district court dismissed the Section 1983 claims with prejudice, noting that they were dismissed "by agreement of all parties * * * *on summary judgment*," not withdrawn. Pet. App. 39a (emphasis added). The court also emphasized that it had "had minimal involvement with the state law claims." *Id.* at 40a. The district court declined to exercise supplemental jurisdiction over the state-law claims that Fox claimed to have alleged; at petitioner's request, the district court remanded the case to state court. *Id.* at 35a-40a.[5]

[5] The court did not determine whether the state-law claims were frivolous; it merely remanded them to state court for determination, where they remain pending. For purposes of this brief, respondents recognize petitioner's assumption—but do not concede—that those claims are nonfrivolous.

Respondents moved for attorney's fees incurred in defending the Section 1983 claims. J.A. 198-199. The district court first determined that respondents were "prevailing parties." Pet. App. 25a-26a. The court found that petitioner had pressed his Section 1983 claims for twenty months before conceding that they were invalid when respondents challenged their legal sufficiency. *Id.* at 26a. The court noted that petitioner could have voluntarily dismissed his federal claims when "he withdrew his own request for judgment," but did not do so. *Ibid.* It also rejected petitioner's argument that "discovery issues impaired his determination of whether he had a viable 42 U.S.C. § 1983 case," noting that petitioner "sought no assistance from the court on those issues." *Ibid.* Instead, the district court concluded that petitioner dismissed the Section 1983 claims simply "to avoid judgment on the merits." *Ibid.* (internal quotation marks and citation omitted).

The district court next concluded that petitioner's claims were "vexatious, frivolous, or otherwise without merit." Pet. App. 27a. Applying the Fifth Circuit's long-settled multifactor test for frivolousness, the court found that petitioner had failed to make out a prima facie case under Section 1983, that petitioner conceded his claims were invalid only after respondents resisted petitioner's repeated settlement demands, and that it had dismissed all of the claims without a trial. *Ibid.*

The court then turned to the amount of the fee award. The court considered whether a reduction from the lodestar amount was warranted, because the related state-law claims had arisen but had not been addressed. The court was "mindful that it should seek to avoid providing windfalls to

attorneys," but it emphasized the unusual course of the proceedings, noting that the parties had litigated petitioner's frivolous Section 1983 claims to the near total exclusion of any state-law claims. Pet. App. 30a, 32a-33a. Although "defendant[s] ha[d] not prevailed regarding plaintiff's state law tort claims," the court explained, "plaintiff failed to allege state tort law violations in the Complaint such that defendants were adequately noticed that a separate defense as to these claims would need to be prepared at the beginning of the litigation." *Id.* at 32a. Moreover, the district court found that "throughout the litigation, the focus of both plaintiff and defendants" was petitioner's Section 1983 claims, not any state tort claims. *Id.* at 32a-33a. The court also found that respondents had *not* "request[ed] attorney's fees related to the defense of the state law claims remanded for decision." *Id.* at 33a.

The district court therefore declined to deviate from the lodestar calculation. It awarded $32,868.00 to respondent Town, representing 273.9 hours at the rate of $120.00 per hour, and $15,183.00 to respondent Vice, representing 105.6 hours at $105.00 per hour. Pet. App. 34a.

Court of Appeals Proceedings

The Fifth Circuit affirmed. It agreed with the district court that respondents were prevailing parties and that petitioner's "§ 1983 claims" were "frivolous, unreasonable, or without foundation." Pet. App. 5a-9a. The Fifth Circuit also agreed with the district court's rejection of petitioner's contention that he dismissed his Section 1983 claims because discovery revealed insufficient evidence to maintain them. To the contrary, the court of appeals concluded that the "federal claims should never have been

brought" and that petitioner "could manufacture no argument to support them when he was challenged." *Id.* at 6a-7a. The court specifically rejected petitioner's attempt to rely on evidence developed during discovery, holding that petitioner had failed to present that material to the district court and had therefore "abandoned" it. *Id.* at 8a n.19.

The court acknowledged that petitioner's frivolous Section 1983 claims were factually related to his state-law claims, but it determined that "deny[ing] fees under these circumstances would defeat the purpose of ever recognizing defendants as 'prevailing parties,' which is to 'protect defendants from burdensome litigation having no legal or factual basis.'" Pet. App. 7a (citation omitted). The court refused to "make a defendant's entitlement to attorneys' fees 'depend not upon the district court's review of the merits of a plaintiff's § 1983 claims, but upon how a plaintiff chose to draft his complaint.'" *Id.* at 10a-11a (citation omitted).

The court then examined the amount of the fee award. When frivolous and nonfrivolous claims are brought in the same suit, the Fifth Circuit explained, "the court must consider the interrelated nature of the frivolous and non-frivolous claims to determine the appropriate fee" and award fees only for "work which can be distinctly traced to a plaintiff's frivolous claims." Pet. App. 11a; see *id.* at 12a ("[W]e are confident that the district court will be able properly to weigh and assess the amount of attorney's fees attributable *exclusively* to a plaintiff's frivolous * * * claims.") (internal quotation marks, citation, and alteration omitted; emphasis added).

The court observed that "[i]n its order awarding [respondents] attorneys' fees, the district court noted

that 'the focus of both [petitioner] and [respondents] was [petitioner's] § 1983 claim.'" Pet. App. 12a (quoting *id.* at 32a-33a). The court of appeals also observed that the district court "noted that '[respondents did] not appear to request attorney's fees related to the defense of the state law claims remanded for decision to the Louisiana state court.'" *Id.* at 12a (quoting *id.* at 33a). "Because the district court specifically restricted its award of attorneys' fees to the proceedings before it, and because the court found that [respondents] *did not seek attorneys' fees for the defense of the state law claims*," the court of appeals explained, "we do not find its award of attorneys' fees [to be] an abuse of discretion." *Id.* at 12a (emphasis added).

Judge Southwick dissented. He agreed that some fee award was appropriate because petitioner "continued too long after it became clear that there was no federal case." Pet. App. 12a-13a. Judge Southwick also agreed with the majority that "usually a party seeking attorneys' fees must allocate the fees separately between the successful claims and the unsuccessful." *Id.* at 13a. He asserted, however, that such allocation "was not done here because the claims were found to be too interrelated." *Ibid.* He then criticized the magistrate judge's reliance on *U.S. for Varco Pruden Buildings* v. *Reid & Gary Strickland Co.*, 161 F.3d 915 (5th Cir. 1998), although he acknowledged that "[t]he majority here does not refer to that same caselaw." Pet. App. 14a-15a. Judge Southwick also acknowledged that "the majority refers to another part of the Magistrate Judge's decision in which she stated that both parties focused throughout litigation on the federal claim." *Id.* at 17a. "That finding," Judge Southwick explained, "does not affect my view that any fee for services by

Vice's counsel that was also necessary for the state claims is not recoverable, no matter what the focus of counsel might have been." *Ibid.* Judge Southwick concluded that "[t]he only fees Fox should be required to pay are those solely applicable to his federal claims." *Ibid.*

SUMMARY OF ARGUMENT

I. More than three decades ago, this Court held that a defendant is eligible for fees where a plaintiff's Section 1983 claim was frivolous. Five years later, the Court held that an otherwise-eligible *plaintiff* need not succeed with respect to the entire lawsuit in order to seek a fee award. There is no reason to craft a different rule for prevailing defendants.

A. The text of Section 1988 asks only whether a litigant is a "prevailing party" in an "action or proceeding to enforce" Section 1983 or another enumerated statute. Respondents satisfied both conditions. They succeeded in establishing that petitioner's Section 1983 claims were frivolous (an issue on which petitioner did not seek this Court's review), and this was just as much an "action or proceeding to enforce" Section 1983 as the plaintiff's partially successful suit in *Hensley*. Indeed, *Hensley* specifically stated that a defendant could simultaneously *recover* fees for a frivolous claim and *owe* fees on a meritorious claim. And even if Section 1988 required defendants to achieve complete success, respondents prevailed on *all* of the claims that could have triggered a fee award in this case.

B. Petitioner's attempt to parse the legislative history does not support his position. He concedes that scattered references in floor statements to frivolous "litigation" and "lawsuits" are inconsistent

with this Court's repeated references to Section 1988 as applying to frivolous "claims." Moreover, the House Committee Report for Section 1988 shows that the drafters contemplated fee awards to partially prevailing defendants even when such defendants were also required to pay fees on meritorious claims.

C. Petitioner is wrong in claiming that his rule is necessary to avoid chilling meritorious claims. There is no mistaking frivolous claims for meritorious ones. Frivolous does not mean "novel," "creative," "withdrawn," or "abandoned." Nor is it appropriate to presume that district courts will ignore this Court's admonition against allowing "hindsight bias" to affect frivolousness determinations.

Petitioner's proposed rule would subvert Section 1988(b)'s purpose of deterring frivolous claims under various federal civil rights statutes. Those who would abuse those statutes would gain an easy end-run around the statute's fee-shifting scheme, and those with ordinary causes of action — say, a breach-of-contract or employment claim — against potential Section 1983 defendants would have good reason to add a civil rights claim to the mix. Petitioner's rule would thus encourage frivolous claims, and that is no small burden, because even frivolous Section 1983 claims take a heavy toll on defendants. The notion that plaintiffs (or their counsel) are incapable of avoiding filing frivolous claims is groundless, as is petitioner's suggestion that Rule 11 is an adequate substitute for the statutory command of Section 1988.

II.A. As for how to calculate a "reasonable" fee award when only some of the claims are frivolous, *Hensley* is again instructive. Because much of counsel's time typically will be devoted to the litigation as

a whole, parsing fees claim-by-claim is inappropriate. Instead, the district court should focus on the significance of the overall success in relation to the hours reasonably worked. The district court's discretion in making that determination—and in deciding whether a defendant ought to receive fees at all—is paramount, and should be guided by decades of experience applying a long list of considerations.

Petitioner's "but for" rule flies in the face of those longstanding principles. What is more, it would allow many plaintiffs to evade substantial liability for filing frivolous claims. And it would undoubtedly lead to wasteful litigation over whether a particular time entry is "exclusively" related to the frivolous claim.

B. Even if petitioner's rule is correct, he now concedes that the Fifth Circuit articulated precisely the same rule. The court of appeals expressly held that respondents were awarded only fees exclusively and distinctly traced to the frivolous Section 1983 claims. Thus, petitioner disputes only the Fifth Circuit's factbound application of his own proposed standard. Even if that question were properly presented, the lower courts' conclusion was amply supported by the record. As the district court found (and the court of appeals affirmed), petitioner's frivolous civil rights claims were the focus of all parties throughout the federal-court litigation.

III. Alternatively, the writ of certiorari should be dismissed as improvidently granted.

A. Petitioner devotes much of his argument to disputing an essential premise upon which he secured this Court's review—namely, that his Section 1983 claims were frivolous. As petitioner concedes, however, that question is not before this Court.

Equally important, much of the sweeping rhetoric and allegations upon which petitioner's merits brief rests (including many of the most dramatic allegations in his Introduction and Statement) were not properly presented to the court below.

B. Petitioner now concedes that the court of appeals stated what he contends is the "correct legal rule" for calculating fee awards. Petitioner's redrafting of his own questions presented does not diminish the significance of that concession. Both petitioner and the court of appeals agree that fees must be "distinctly" and "exclusively" traceable to the frivolous Section 1983 claims. Judge Southwick's dissenting opinion below reached the same conclusion—it simply disputed whether the district court had actually separated the fees. This Court did not grant certiorari to determine whether the district court abused its discretion in concluding that it had successfully awarded those fees exclusively related to the frivolous Section 1983 claims.

ARGUMENT

I. Plaintiffs Who Bring Frivolous Section 1983 Claims Gain No Categorical Immunity From Fee Awards Simply By Including A Nonfrivolous And Factually Related Claim

Congress has provided that, "[i]n any action or proceeding to enforce a provision of" 42 U.S.C. § 1983, a district "court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). More than three decades ago, this Court held that that language authorizes fees to a prevailing defendant if the court "finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff

continued to litigate after it clearly became so." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978).[6] That frivolousness threshold, the Court explained, represents the "proper accommodation of [various] competing considerations," including "mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit" while also "deter[ring] the bringing of lawsuits without foundation." *Id.* at 420 (internal quotation marks and citation omitted). And "entrusting the effectuation of the statutory policy to the discretion of the district courts," *id.* at 416, was "appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

Those longstanding principles require rejection of petitioner's first argument—*i.e.*, that a district court may not award fees for the defense of a frivolous Section 1983 claim so long as the plaintiff also pleads at least one related, nonfrivolous claim. Petitioner does not dispute that, as the court of appeals held, respondents "are 'prevailing parties' for purposes of * * * § 1988." Pet. App. 7a. And the fact that a plaintiff pleaded at least one nonfrivolous claim (which may well not even arise under a statute that authorizes fee-shifting) does not make a frivolous Section 1983 claim any less so.

Nor is petitioner's rule necessary to avoid chilling meritorious Section 1983 claims. It is well-settled that "frivolous" does not mean novel, or that the

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[6] For simplicity's sake, we refer to these criteria collectively as "frivolousness."

claim simply failed as a legal or factual matter. To the contrary, this Court has stated—and lower courts have acknowledged—that a claim is frivolous only if it is objectively baseless. There is thus little risk of confusing frivolous claims with meritorious ones. Indeed, adopting petitioner's proposed rule would likely generate an increase in frivolous claims.

A. Text And Precedent Establish That A District Court Has Discretion To Award Fees To Any Defendant Who Prevails On A Frivolous Section 1983 Claim

The plain meaning and longstanding operation of Section 1988 show that a district court has discretion to award fees for defending frivolous federal civil rights claims. The statutory text imposes only two threshold requirements: The suit must be an "action or proceeding to enforce" one of the specified statutes, and the party seeking fees must be a "prevailing party." 42 U.S.C. § 1988(b). As noted above, neither requirement is disputed here. Accordingly, the remaining question is whether it is categorically impermissible for a district court to award fees so long as the plaintiff has pleaded at least one nonfrivolous claim that is factually related to a frivolous claim. This Court's decisions demonstrate that the answer is "no."

1. In *Christiansburg*, *supra*, the Court considered "what standard should inform a district court's discretion in deciding whether to award attorney's fees to a successful *defendant*" under a fee-shifting statute that was materially identical to Section 1988. 434 U.S. at 417; see *Hughes* v. *Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam) (applying *Christiansburg* standard to case under Section 1988). The Court

rejected the view that a defendant may be awarded fees only "where the plaintiff was motivated by bad faith in bringing the action." *Christiansburg*, 434 U.S. at 419. Explaining that "[a] fair adversary process presupposes both a vigorous prosecution and a vigorous defense," the Court declined to assume that "Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith." *Ibid.*

At the same time, *Christiansburg* concluded that the threshold for awarding fees to a prevailing defendant should be higher than for a prevailing plaintiff. Prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Christiansburg*, 434 U.S. at 416-417 (quoting *Newman* v. *Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam)). In contrast, *Christiansburg* recognized both a greater hurdle for fees to a prevailing defendant and the central role of a district court's discretion: "[A] district court may in its discretion award attorney's fees to a prevailing defendant * * * upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 421. That standard represents "a proper accommodation of the competing considerations" of "mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit" while also "deter[ring] the bringing of lawsuits without foundation." *Id.* at 420 (internal quotation marks and citation omitted).

2. Because *Christiansburg* involved a plaintiff who had asserted a single claim, see 434 U.S. at 414-

415, the Court had no occasion to address how the frivolousness standard applied where the plaintiff asserted multiple claims, some frivolous and some not. In *Hensley*, *supra*, however, the Court considered the propriety of a fee award to plaintiffs who prevailed on some, but not all, of their civil rights claims. See 461 U.S. at 427-429.

Hensley addressed the issue in two parts, the first of which is most directly relevant here. See Part II.A, *infra* (discussing the second part of *Hensley*'s analysis). The Court began by concluding that a plaintiff's suit need not be 100% successful to qualify for a fee award. Instead, the Court stated that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any* significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433 (internal quotation marks and citation omitted; emphasis added).

The *Hensley* Court expressly recognized that its holding would produce situations where *both* plaintiff and defendant are "prevailing parties"—that is, those where some of the plaintiff's claims succeed and some fail. And the Court stated that, even in those situations, "the defendant may recover attorney's fees incurred in responding to" an unsuccessful claim "[i]f the unsuccessful claim is frivolous." 461 U.S. at 435 n.10. The Court hardly could have been clearer: Partial success does not categorically disqualify *either side* from eligibility for a fee award.

3. Petitioner's attempts to distinguish *Hensley* are unconvincing. Petitioner asserts (at 36) that *Hensley*'s first holding—that a partially prevailing plaintiff may recover fees—is inapplicable to partially prevailing defendants. But he cites no language from

Hensley supporting such a distinction, and such an interpretation requires ignoring what the Court said very clearly in footnote 10.

The same is true of petitioner's efforts to read the pertinent language in *Hensley* as barring any fees to a defendant unless "the frivolous claim is based on completely 'different facts and legal theories'" than the nonfrivolous claims. Pet. Br. 34 (quoting *Hensley*, 461 U.S. at 434-435 & n.10). That is not what *Hensley* said. The Court's references to "different facts and legal theories" and "separate lawsuits" are not in the relevant footnote, and they do not suggest that either party's status as a "prevailing party" turns on the "relatedness" of the unsuccessful claims. Instead, those references were made in discussing how unrelated claims should be considered in calculating the *amount* of a "reasonable" fee award to a partially prevailing party. *See Hensley*, 461 U.S. at 435.

Petitioner's argument also overlooks the more fundamental significance of the Court's statement in *Hensley*. That footnote indicates that a defendant may sometimes obtain fees for frivolous claims *even if the plaintiff wins outright on other claims*. It is hard to square that result—one in which even a partially victorious plaintiff can potentially be required to pay some of the defendant's attorney's fees—with petitioner's rule that a defendant must not only win every factually related claim but also demonstrate that each and every such claim is frivolous.

4. Even if the number of claims on which a party succeeded were determinative of the threshold question of whether that party is "prevailing"—and *Hensley* instructs it is not—petitioner has selected the wrong denominator. Section 1988 speaks of "prevailing" in an "action or proceeding to enforce"

several enumerated federal civil rights laws, including Section 1983. 42 U.S.C. § 1988(b). It does not speak of actions to enforce *other* laws—particularly not other *state* laws. Accordingly, when determining whether a party has "prevail[ed]" for purposes of Section 1988, all that could conceivably matter would be success or failure on the qualifying federal civil rights claims. A plaintiff who (like petitioner) brings both Section 1983 claims and state-law claims may not *recover* attorney's fees if the federal claims are rejected but the state-law claims succeed. *See, e.g., Robles* v. *Prince George's Cnty.*, 302 F.3d 262, 272 (4th Cir. 2002). The same should be true for defendants. A defendant forced to defend against a frivolous Section 1983 claim should not have its eligibility for fees turn on whether the plaintiff also brought state-law claims that may or may not have been frivolous.

B. Section 1988's Legislative History Does Not Support Petitioner

Petitioner asserts (at 33) that various items of legislative history show that Congress intended to condition a defendant's (but not a plaintiff's) eligibility for fees on winning every factually related claim in an entire lawsuit. That is incorrect. For one thing, as petitioner acknowledges (at 34), this Court has repeatedly described Section 1988 as addressing Section 1983 "claims," not entire "lawsuits." *See City of Riverside* v. *Rivera*, 477 U.S. 561, 580 (1986) (district court has discretion "to award attorney's fees against plaintiffs who litigate frivolous or vexatious claims"); *Hensley*, 461 U.S. at 435 n.10 (defendant may recover fees if plaintiff included a frivolous "claim" in an otherwise meritorious lawsuit); *Rouse*, 449 U.S. at 15 (prevailing defendant can only recover

fees when "a court finds that [a plaintiff's] claim was frivolous, unreasonable, or groundless") (internal quotation marks and citation omitted); *Christiansburg*, 434 U.S. at 422 (purpose of fee-shifting statute was to "assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success").

Nevertheless, petitioner asserts that the legislative history shows that Congress was concerned only with awarding fees "when the *entire lawsuit* is frivolous," quoting a sentence from *Christiansburg* discussing the legislative history of the fee-shifting statute at issue in that case. Pet. Br. 33. The passage on which petitioner relies cannot bear such weight. To be sure, the opinion quotes remarks by Senators Lausche, Pastore, and Humphrey, each of whom used the word "lawsuits" or "suits." But the Court described those "sparse" sources as "reveal[ing] little more than the barest outlines of a proper accommodation of the competing considerations" at work in the statute. 434 U.S. at 420. And the Court relied on those statements only as additional support for *rejecting* the notion that Congress did not intend any fee awards to defendants. *Id.* at 422.[7]

[7] Even if it were appropriate to seize upon these scattered references to "lawsuits" or "litigation," it does not follow that Congress intended to preclude fee awards where a plaintiff has included a non-frivolous *state-law* claim. As explained above (*supra* pp. 22-23), all of petitioner's Section 1983 "lawsuit" was declared frivolous. It would be quite a stretch to assume that Congress meant to immunize a plaintiff from a fee award simply because he included a state cause of action that does not trigger Section 1988 at all.

Moreover, such "isolated statements" from mere floor discussions are "not impressive legislative history." *Garcia* v. *United States*, 469 U.S. 70, 78 (1984) (internal quotation marks and citation omitted). Far "more authoritative," *id.* at 76, is the official House Report for Section 1988(b), which confirms that Congress contemplated fee awards for frivolous claims included alongside nonfrivolous claims. In particular, the Report cited *Carrion* v. *Yeshiva University*, 535 F.2d 722, 729 n.9 (2d Cir. 1976), as an example of a case in which a "court may award counsel fees to the prevailing defendant." H.R. Rep. No. 94-1558, at 7 (1976). *Carrion* involved an action that "combine[d] a frivolous and an arguably non-frivolous *claim*." 535 F.2d at 729 n.9 (emphasis added). The claims also were factually related, because both arose out of the plaintiff's lack of promotion and discharge from employment. *Id.* at 724. The *Carrion* court not only upheld a fee award to the prevailing defendant for the "defense of the [frivolous] Title VII *claim*," it also expressly *rejected* the argument that the presence of a nonfrivolous claim somehow "altered" whether the defendant was eligible for fees incurred in "the defense of the [frivolous] Title VII *claim*." *Id.* at 729 n.9 (emphasis added).

C. Permitting Fees Against Any Plaintiff Who Brings A Frivolous Section 1983 Claim Appropriately Balances The Purposes Of The Fee-Shifting Statute

Petitioner largely ignores the terms of the statute and this Court's decisions explicating when a party is eligible for fees. Rather, petitioner begins and ends with what he describes as "[t]he equitable considerations that underlie this Court's attorneys' fee decisions." Pet. Br. 31 (internal quotation marks

omitted. Such considerations, however, only confirm that petitioner's proposed rule is contrary to Congress's intent.

1. Permitting Fees For Frivolous Section 1983 Claims Will Not Discourage Meritorious Ones

Petitioner and his *amici* repeatedly contend that authorizing fees for frivolous Section 1983 claims that are factually related to nonfrivolous ones will "chill" meritorious Section 1983 claims. That concern is misplaced. "When a court imposes fees on a plaintiff who has pressed a 'frivolous' claim, it chills nothing that is worth encouraging." *Hutchinson* v. *Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993).

a. The premise of petitioner's argument – that a reasonable plaintiff will fear having a potentially *meritorious* claim confused with a *frivolous* one – is false. Frivolousness is a high and specific bar. As this Court explained in *Christiansburg*, it does not mean "simply that the plaintiff has ultimately lost his case"; a claim is *frivolous* only if it is "groundless or without foundation." 434 U.S. at 421. Following that guidance, the courts of appeals have repeatedly recognized that the "standard for awarding attorney's fees to prevailing defendants in a civil rights suit is difficult to meet, and rightly so." *Lamboy-Ortiz* v. *Ortiz-Velez*, No. 09-1649, 2010 WL 5129824, at *5 (1st Cir. Dec. 17, 2010); see also, *e.g.*, *Sista* v. *CDC Ixis N. Am.*, 445 F.3d 161, 178 (2d Cir. 2006) ("[I]t is very rare that victorious defendants in civil rights cases will recover attorneys' fees.").

Not only is frivolousness a high threshold, it does *not* reach the circumstances that petitioner and his *amici* suggest. Courts have long recognized the "significant difference between making a weak

argument with little chance of success * * * and making a frivolous argument with no chance of success." *Khan* v. *Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999); see, *e.g.*, *Tancredi* v. *Metropolitan Life Ins. Co.*, 378 F.3d 220, 230 (2d Cir. 2004) ("allegation * * * was very weak, but it was not completely without foundation"); *Riddle* v. *Egensperger*, 266 F.3d 542, 550-553 (6th Cir. 2001) (a ruling on summary judgment that a claim is "without merit[] does not necessarily support the conclusion that the plaintiff's claims were frivolous").

Likewise—and contrary to petitioner's repeated suggestions (Pet. Br. i, 23, 43-44, 47, 48)—a claim is not frivolous simply because it has been "abandoned," "withdrawn," or "dismissed" ("voluntarily" or otherwise). As this Court has made clear, the fact of dismissal "is not in itself a sufficient justification for the fee award." *Roue*, 449 U.S. at 14. Nor does a party risk a frivolousness determination simply because discovery revealed the claim to be without merit. "[T]he course of litigation is rarely predictable," and courts will not punish a party for withdrawing a claim because "[d]ecisive facts may not emerge until discovery or trial [or] [t]he law may change or clarify in the midst of litigation." *Christiansburg*, 434 U.S. at 422. To the contrary, a claim may be frivolous precisely *because* "the plaintiff continued to litigate *after it clearly became* so." *Ibid.* (emphasis added). Accordingly, petitioner's assertion that the decision below will discourage plaintiffs from

withdrawing claims when they are later discovered to be unsupported is baseless.[8]

Frivolousness also is not a proxy for novel claims, whether as an extension of a legal rule or a bid to overrule a particular case. *See, e.g., Tancredi*, 378 F.3d at 230 ("Although [a contrary Supreme Court case] was decided after plaintiffs filed their complaint, it illustrates the nebulous character of the state action test, and lends some support, however quixotic, to litigants like the plaintiffs in this case."); *Barnes Found.* v. *Township of Lower Merion*, 242 F.3d 151, 162 (3d Cir. 2001) (claim not frivolous since the availability of a defense fatal to the claim "was not completely established in this court" and "other courts had not come to a uniform conclusion on the point"); *Khan*, 180 F.3d at 837 (existence of a "good faith argument for an extension of existing law" justified district court's denial of fees to defendant); *Jane L.* v. *Bangerter*, 61 F.3d 1505, 1514 (10th Cir. 1995) ("A legal argument is not frivolous merely because the Supreme Court has failed to affirmatively address and accept it."); *Tarter* v. *Raybuck*, 742 F.2d 977, 987 (6th Cir. 1984) (reversing fee award because legal issue had not been settled); cf. Fed. R. Civ. P. 11(b)(2) (parties not subject to sanction so long as they advance claims "warranted by * * * a nonfrivolous argument for extending, modifying, or reversing existing law").

[8] It bears repeating that the district court expressly rejected petitioner's argument that "discovery issues impaired his determination of whether he had a viable 42 U.S.C. § 1983 case." Pet. App. 26a.

For that reason, petitioner's *amici* are wrong to suggest that a claim seeking to overturn a decision of even this Court would be at risk of being declared frivolous. ACLU Br. 23 (asserting that claims challenging *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), would have been deemed frivolous). The hallmark of frivolousness is *ignoring* a binding decision. Here, for example, petitioner did not claim that the "official policy or custom" requirement of *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), did not apply to his claim against the Town — or even that *Monell* should be overruled. He simply failed to articulate any basis that he satisfied that standard.[9]

Petitioner's *amici* also erroneously claim that it is "difficult to distinguish, *ex ante*, between colorable claims * * * [and] those that a court could deem frivolous." ACLU Br. 25. *Amici* point to a study of Rule 11 sanctions finding that 19% of instances in which a court of appeals reversed a district court's

[9] As part of his broadside attack on the lower courts' frivolousness determination, petitioner notes that respondents removed this case to federal court and did not immediately move to dismiss. The frivolousness question, however, is not before this Court. *See* Part III.A, *infra*. In any event, removal recognizes merely the defendant's right to have a federal forum adjudicate federal claims. The fact that respondents did not immediately move to dismiss petitioner's claims also proves nothing about their merit. To the contrary, discovery is often necessary for a defendant to determine whether the plaintiff's claims have any basis. *See, e.g.*, *Myers* v. *City of W. Monroe*, 211 F.3d 289, 292 (5th Cir. 2000) (defendant's failure to move for dismissal "should not be seen as conclusively establishing that [plaintiff's] claims were not frivolous," because it was unclear before plaintiff's testimony whether a "genuine question of material fact" existed).

sanctions award "were based on the appellate court's finding that the cases were meritorious." *Id.* at 26 (citing Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. Rev. 65, 94 (1996) (in turn citing Federal Judicial Center, Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States § 5 at 21 (1991) (FJC Report))). But that indicates only that errors in frivolousness determinations are *corrected* on appeal. Far more telling—as the same study reports—is that appellate courts "reversed the denial of sanctions" only "6% of the time." FJC Report §1D at 2; see also *id.* §5 at 20. Thus, even when the district court and appellate court disagree, it is far more likely that the sanctions will be *eliminated* on appeal.[10]

b. Much of petitioner's argument rests on the assertion that "hindsight bias" will lead courts to make erroneous frivolousness determinations, such that plaintiffs with meritorious Section 1983 claims will be deterred for fear of a mistaken fee award. Leaving aside that such concerns are properly directed at the frivolousness determination itself—on which petitioner did not seek this Court's review, see Part III.A, *infra*—this Court has specifically cautioned courts *not* to allow "hindsight logic" to affect an evaluation of frivolousness. *Christiansburg*, 434 U.S. at 422; see *id.* at 421-422 (Courts must "resist the understandable temptation to engage in *post hoc*

[10] That study also refutes the notion that novel or "creative" arguments will be deemed frivolous. *Id.* §1C at 4 (noting "few, if any, cases in which the argument that was the subject of sanctions could reasonably be construed as an argument for the good-faith extension or modification of the law").

reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."). "Trial judges are presumed to know the law and to apply it in making their decisions." *Lambrix* v. *Singletary*, 520 U.S. 518, 532 n.4 (1997) (internal quotation marks and citation omitted). The law stated in *Christiansburg* is no exception.

Even if a district court erroneously deems a claim frivolous and awards fees to a defendant, courts of appeals "have not hesitated to reverse such awards [to prevailing defendants] in the past." *Louery* v. *Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427, 437 (6th Cir. 2009); see *Bonner* v. *Mobile Energy Servs. Co.*, 246 F.3d 1303, 1305 (11th Cir. 2001) (holding that district court abused its discretion by awarding fees to prevailing Title VII defendants even though the plaintiff's evidence was "markedly weak").

c. In addition, a finding of frivolousness is merely a necessary—but not sufficient—condition for a defendant to receive fees under Section 1988(b). Whereas district courts "*must* award fees to the prevailing plaintiff" under Section 1988 in the absence of special circumstances, district courts retain discretion whether to award fees to a prevailing defendant under Section 1988 for a frivolous federal civil rights claim. *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 761 (1989). Given their "intimate[] familiar[ity] with the course of the litigation," *Rouse*, 449 U.S. at 23 (Rehnquist, J., dissenting), district courts are well equipped to make the inquiries required by *Christiansburg* and necessary to effectuate Section 1988's dual purposes.

d. Even crediting all of petitioner's flawed assumptions, the possibility that some nonfrivolous Section 1983 claims may be deterred is not sufficient justification for petitioner's rule. The same objections could have been levied against allowing fee awards to *any* prevailing defendant, but that rule was laid down more than three decades ago in *Christiansburg* and *Rouse*.

The Court's reasons for doing so remain sound. Section 1988 is not designed to *maximize* the number of meritorious Section 1983 claims, but rather to strike the appropriate *balance* between encouraging those claims and discouraging frivolous ones. Congress entrusted the vindication of federal civil rights to the "adversary judicial process," which "presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg*, 434 U.S. at 419. There is no reason to assume that Congress intended "to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action." *Ibid.*[11]

Petitioner's rule rests on precisely that assumption and mistakenly assumes that Section 1988 should be read to encourage Section 1983 claims at

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[11] The notion that Section 1988 is a litigation-maximizing statute cannot be squared with *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 610 (2001). That case rejected fee awards to plaintiffs where the lawsuit was the "catalyst" for a change in the defendant's practices but there was no judicial decree changing the parties' legal relationship. If plaintiffs are not necessarily entitled to fees for causing change, surely the statute cannot be read to encourage litigation at all costs.

every opportunity. But "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law," *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam), and Section 1988 is the classic example of Congress striking a compromise between sometimes competing objectives. As explained below, petitioner's rule would frustrate the statute's undisputed purpose to deter frivolous federal civil rights claims, and it ignores Congress's decisions concerning "what competing values will or will not be sacrificed to the achievement of a particular objective." *Ibid.*

2. Petitioner's Proposed Rule Would Encourage Frivolous Section 1983 Claims

Another important purpose of Section 1988(b)'s fee-shifting regime is to *discourage* frivolous claims invoking Section 1983 and the other enumerated statutes. *Christiansburg*, 434 U.S. at 420-422. Petitioner's all-or-nothing rule would eviscerate that goal; indeed, it would *encourage* frivolous Section 1983 claims.

a. "[W]hile Congress wanted to clear the way for suits to be brought," this Court explained in *Christiansburg*, "it also wanted to protect defendants from burdensome litigation having no legal or factual basis." 434 U.S. at 420. The availability of fee awards to defendants who successfully resist frivolous Section 1983 claims is essential to achieving that balance.

Such protection is necessary because Section 1983 defendants are inviting targets. Local governments and state and local officials constantly engage in activities—operating prisons, maintaining police and

fire departments, running schools—that expose them to frivolous civil rights claims. See, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973) (recognizing the "boundless" possibilities for litigation under Section 1983 by state prisoners who "eat[], sleep[], dress[], wash[], work[] and play[] *** under the watchful eye of the State").[12] Such claims involving "bare allegations" of a deprivation of a federally protected right would subject public employees and state and local governments to the possible crushing "costs of trial or to the burdens of broad-reaching discovery." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982).

Such defendants are typically the "least able to bear" the costs of such frivolous litigation, which could result in "a severe limitation on [governmental defendants'] ability to serve the public." *Owen* v. *City of Independence*, 445 U.S. 622, 670 (1980) (Powell, J., dissenting); see *Spallone* v. *United States*, 493 U.S. 265, 297 (1990) (noting that imposing costs "against the public fisc *** curtail[s] various public services"). This threat is particularly acute because most municipalities and states indemnify employees for official actions. See *Monell*, 436 U.S. at 713 n.9 (Powell, J., concurring); Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 330-338.

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[12] Section 1983 litigation remains an attractive option for idle prisoners, even after passage of the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e *et seq.* See *Jones* v. *Bock*, 549 U.S. 199, 203 (2007) ("Prisoner litigation continues to account for an outsized share of filings in federal district courts.") (internal quotation marks and citation omitted).

Allowing prevailing defendants to recover fees against plaintiffs bringing frivolous civil rights claims does more than protect defendants. "[F]rivolous civil rights claims waste judicial resources that would otherwise be used for legitimate claims." *Ward* v. *Hickey*, 996 F.2d 448, 455 (1st Cir. 1993). Deterring abuse of civil rights statutes lessens the burden of frivolous lawsuits on judicial dockets, "ensur[ing] that the ability of the courts to remedy civil rights violations is not restricted by dockets crowded with baseless litigation." *Munson* v. *Milwaukee Bd. of Sch. Dirs.*, 969 F.2d 266, 269 (7th Cir. 1992) (citation omitted); see *Foster* v. *Mydas Assocs.*, 943 F.2d 139, 146 (1st Cir. 1991) (threat of fees for frivolous claims "actually benefits civil rights plaintiffs as a group by freeing up resources for worthy suits").

More broadly, abuse of civil rights statutes threatens their basic fairness. "The authority which federal courts possess * * * is an authority built upon respect for judicial process. That authority cannot, in the long run, be effectively invoked on behalf of civil rights enforcement if civil rights litigants could themselves disregard it with impunity." *Blue* v. *Department of the Army*, 914 F.2d 525, 535 (4th Cir. 1990). Inclusion of a related nonfrivolous claim does not diminish the damage done by the frivolous Section 1983 claim. That is particularly true where, as here, *all* of the Section 1983 claims are frivolous.

Petitioner asserts (at 33) "there is no evidence * * * that [petitioner's] motivation in adding the § 1983 claim was vexatious, harassing, or oppressive." Indeed, petitioner echoes that theme throughout his brief—suggesting that he did not know his Section 1983 claims were frivolous (Pet. Br. 12, 16, 38-42, 44-45)—and his *amici* explicitly con-

tend that "if the action is not brought in bad faith, [attorney's] fees should not be allowed." Liberty Inst. Br. 8 (quoting H.R. Rep. No. 94-1558, at 7). This Court, however, explicitly *rejected* a subjective bad faith standard in *Christiansburg*. 434 U.S. at 419 (Congress "did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith.").

b. Petitioner's proposed rule would eviscerate the protection that Section 1988(b) affords defendants. A plaintiff hoping to avoid a fee award would need only add a related, nonfrivolous cause of action—including one based on a federal statute or even state law—as part of his lawsuit. That other claim would need not be meritorious or even likely to succeed; rather, it would need only pass the extraordinarily low bar for being declared nonfrivolous. As those with long experience in the trenches will attest, such a claim would be surpassingly easy to pair with the most common frivolous Section 1983 claims. See generally Br. *Amici Curiae* Arkansas *et al.*

Conversely, petitioner's proposed rule would give plaintiffs with ordinary tort claims against government actors a significant incentive to add a Section 1983 claim—no matter how marginal—to the mix. Here too, doing so would often be quite easy. A simple breach-of-contract action against a municipality could be recharacterized as a violation of due process or some other constitutional tort. Yet again, those who represent state and local governments on a daily basis confirm that this possibility is all too real. See generally Br. *Amici Curiae* International Municipal Lawyers Ass'n *et al.* (State/Local Br.).

The enticements for bringing (or adding) Section 1983 claims are substantial. For starters, recharacterizing an ordinary claim as a Section 1983 claim may give a plaintiff access to (supposedly) deep-pocketed defendants. Take, for example, petitioner's Section 1983 claims against the Town. Petitioner's complaint did not allege that Vice's conduct was the product of a "policy or custom" adopted by the Town, see J.A. 37-43—an essential requirement for a damages claim under *Monell*. Indeed, that is one of the principal reasons why petitioner's claims were frivolous. Yet under petitioner's rule, plaintiffs would easily be able to drag municipal defendants into cases where they do not belong without any fear of exposure to fees under Section 1988(b). So too for plaintiffs trying to make a personal dispute with a government employee into a Section 1983 violation in hopes of triggering the possibility that the government employer would indemnify an otherwise judgment-proof defendant. By making actions "in the ambit of [the defendant's] personal pursuits," *Screws v. United States*, 325 U.S. 91, 111 (1945) (opinion of Douglas, J.)—such as, in this case, the *anonymous* extortion letter—into an "official capacity" action, plaintiffs would hope to gain access to (and extract settlements from) defendants with means to pay a substantial judgment.

c. Petitioner is incorrect (Pet. Br. 31) that a frivolous Section 1983 claim that is factually related to a nonfrivolous claim imposes little or no "incremental burden" on defendants. As a practical matter, a lawsuit that includes a Section 1983 claim weighs far more heavily on defendants than one without. The risk of paying a fee award is itself a serious burden; indeed, fee awards can dwarf the damages claimed. See *Ritzen*, 477 U.S. at 565, 581 (upholding

fees of $245,456 where damages totaled $33,350). The additional work required to defend a Section 1983 claim is also significant—even if it is "factually interrelated" with a nonfrivolous claim. Whether a defendant acted "under color of law," for example, is a substantial question that typically requires significant additional discovery and has occasioned no shortage of legal controversy. Likewise, whether a municipality maintained an "official policy or custom" giving rise to alleged misconduct is a separate inquiry altogether. As those with vast experience defending such claims will again confirm, *see generally* State/Local Br., the addition of a Section 1983 claim is often a game-changer.

d. Petitioner also claims that plaintiffs need not—or cannot—be deterred from filing claims that are "legally" frivolous but factually related to nonfrivolous claims. That is wrong on several levels.

For starters, petitioner's argument presupposes an easy distinction between factually related legal theories and non-factually related legal theories. Pet. Br. 21. But this Court "has long noted the difficulty of distinguishing between legal and factual issues." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401 (1990), and the claims in this very case demonstrate the fallacy of petitioner's suggestion. While the frivolous Section 1983 claims and nonfrivolous state-law tort claims are related on some facts, there are other, crucial fact-intensive issues on which they are unrelated. Petitioner's portrayal of this case as a "single, indivisible tort suit" in which "all the legal claims were founded on the same facts" (Pet. Br. 21) ignores that reality.

For example, petitioner's Section 1983 claims required proof that Vice acted "under color of" state

law." *West* v. *Atkins*, 487 U.S. 42, 48 (1988). This inquiry often turns on a fact-intensive inquiry into "the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Martinez* v. *Colon*, 54 F.3d 980, 986 (1st Cir. 1995). With respect to the Town, petitioner was required to "identify a municipal policy or custom that caused the plaintiff's injury." *Board of Comm'rs of Bryan Cnty.* v. *Brown*, 520 U.S. 397, 403 (1997) (internal quotation marks omitted). And with respect to both Vice and the Town, petitioner had to establish that he was deprived of a "right secured by the Constitution and the laws of the United States." *West*, 487 U.S. at 48. That was no minor addition in light of petitioner's far-ranging allegations. J.A. 41 (listing seven constitutional theories plus "other claims to be proven at trial").

e. Petitioner's argument (at 44) that a litigant is incapable of determining whether a claim is "legally" deficient is likewise misguided. That argument once again presupposes an inevitably straightforward answer to whether a Section 1983 claim failed because of "legal" or "factual" deficiencies. In this case, for example, petitioner's Section 1983 claims were frivolous at least in part because of factual deficiencies—*e.g.*, the fact that the extortion letter was sent anonymously, and the fact that petitioner could make no allegation that the Town had a "custom or policy" relevant to this case. J.A. 37-43. And petitioner's claims were not declared frivolous because his "legal" theory was objectively baseless. Rather, petitioner ultimately acknowledged that he lacked a legitimate *factual* basis for claiming that Vice acted under color of law or that he had suffered

any constitutionally significant injury because he won the election. J.A. 169-170.

Even if the frivolousness question turned exclusively on a "legal" question, that cannot insulate a party from the statute's reach. Indeed, this Court recently confirmed that fee-shifting statutes like Section 1988(b) run directly to the litigant, not the lawyers. *See Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2527 (2010) ("[T]he statute's plain text * * * 'awards' the fees to the litigant."); *id.* at 2529 (noting that Section 1988(b) "contains virtually identical" language). The statute's *burdens* likewise fall on the parties; as this Court has observed, Section 1988 "was not intended to permit recovery from opposing counsel." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 761 n.9 (1980); accord S. Rep. No. 94-1011, at 5 (1976) (Section 1988 was meant to provide for "an award of attorney's fees against a *party*") (emphasis added). While there may be instances in which a losing attorney is to blame for a frivolous Section 1983 claim, it is up to Congress, not the courts, whether to limit fee awards accordingly.

In any event, petitioner's concern that innocent litigants will suffer at the hands of their lawyers is misplaced. If a client faces a fee award because a lawyer persuaded him to include a frivolous Section 1983 claim, a traditional malpractice action would be available to recover those costs. *See, e.g., Durrett* v. *Jenkins Brickyard, Inc.*, 678 F.2d 911, 916 (11th Cir. 1982) (where a plaintiff's attorney was "primarily culpable" for asserting frivolous claims for purposes of Section 1988, a plaintiff "may find relief * * * in the form of a malpractice action").

f. Petitioner and his *amici* claim that Fed. R. Civ. P. 11 makes a fee award under these circumstances

unnecessary. Pet. Br. 23, 45; ACLU Br. 15. Not so. That argument is simply a disagreement with Congress's decision to make fee awards available to the "prevailing *party*" rather than to only a prevailing *plaintiff*. The argument likewise runs headlong into *Christiansburg* and *Rouse*, which declared in unmistakable terms that Congress intended to make defendants eligible for fee awards. Rule 11 and lawyers' general ethical obligations not to bring frivolous litigation long predated Section 1988(b), which was not enacted until 1976. *See Hensley*, 461 U.S. at 429. Congress plainly determined that more was needed.

More fundamentally, "Rule 11 is not a fee-shifting statute." *Cooter & Gell*, 496 U.S. at 409. Rule 11 is "aimed at curbing abuses of the judicial system," *id.* at 397, and is intended only "to govern those who practice before the courts," *Business Guides, Inc.* v. *Chromatic Communications Enters.*, 498 U.S. 533, 556 (1991) (Kennedy, J., dissenting). In contrast, fee-shifting statutes like Section 1988 "reflect policy choices by Congress regarding the extent to which certain types of litigation should be encouraged or discouraged." *Id.* at 567. In addition, this Court has already rejected the idea that Section 1988 should be construed to authorize an award of attorney's fees only in those situations in which a litigant would be able to recover fees in its absence. *See Christiansburg*, 434 U.S. at 419; *Newman*, 390 U.S. at 402 n.4.

II. The District Court's Judgment Should Be Affirmed

The second question presented in the petition for a writ of certiorari is whether it is "improper to award defendants all of the attorney's fees they incurred in an action under Section 1988, where the fees were spent defending nonfrivolous claims that were intertwined with the frivolous claim?" Pet. i. As explained below (see Part III.B, *infra*), that question appears to be no longer presented in this case because petitioner now *concedes* that the court of appeals "stated the correct rule" in holding that only fees "exclusively" and "distinctly" traceable to the frivolous Section 1983 claims were sought and awarded. Pet. Br. 48.

Nonetheless, we address both the question on which the Court granted certiorari and petitioner's assertion that the court of appeals "misapplied the rule" (Pet. Br. 48) that it announced in its opinion. Under Section 1988(b), if a defendant incurs fees defending a frivolous Section 1983 claim, the district court has discretion to award those fees in proportion to the defendant's overall "success" in defeating the plaintiff's claims, even if not all of the plaintiff's claims were deemed frivolous. That principle governs calculation of fee awards to prevailing plaintiffs, and it likewise should determine the size of awards to prevailing defendants. And even if fees awarded to a defendant must be traceable *exclusively* to a frivolous Section 1983 claim, the court of appeals correctly found that standard satisfied here.

A. A District Court Has Discretion To Award Fees For Work Directly Traceable To A Frivolous Section 1983 Claim, Even If Some Portion Of That Work Also Is Traceable To Nonfrivolous State Tort Claims

1. When it comes to calculating the *amount* of a fee award, the statutory text vests district courts with "discretion" to determine a "reasonable" fee. 42 U.S.C. § 1988(b). Those terms are inconsistent with a categorical rule permitting only fees traceable *exclusively* to a frivolous Section 1983 claim.[13]

Hensley confirms that flexibility is key. When considering how to calculate awards for partially prevailing plaintiffs, *Hensley* specifically confronted the issue of related claims—*i.e.*, those involving "a common core of facts or * * * based on related legal theories." 461 U.S. at 435. The Court recognized that "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Ibid.* Yet that is precisely what petitioner urges in contending that fees are recoverable only if traceable *exclusively* to frivolous Section 1983 claims.

2. Instead, courts should look at the lawsuit as a whole and determine the extent to which the defendant succeeded in establishing that the plaintiff's

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[13] Respondents do not contend that a defendant may be awarded fees for work not directly traceable to a frivolous Section 1983 claim. The question is what to do with fees that are directly traceable *both* to a frivolous Section 1983 claim *and* a nonfrivolous claim.

claims were frivolous. See *Hensley*, 461 U.S. at 435 ("[T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."); *Rivera*, 477 U.S. at 569 (same). The essential question is whether the defendant "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley*, 461 U.S. at 434.

Traditional methods for assessing fee awards are fully adequate to this task. The district court should first determine a "lodestar" amount by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Rivera*, 477 U.S. at 568. The court may then adjust that amount up or down by applying various factors, including the degree of success obtained by the prevailing party. *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984); see *Hensley*, 461 U.S. at 429-430 & n.3 (listing twelve factors). Though obviously subject to meaningful appellate review, the primary responsibility for this process should remain entrusted to the sound discretion of the district court, which "often ha[s] the keener appreciation of those facts and circumstances peculiar to particular cases." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421-422 (1975).

3. Petitioner's "but for" rule (Pet. Br. 49) would have at least two additional negative consequences. First, it would permit a plaintiff who brings frivolous Section 1983 claims to evade most—and perhaps all—responsibility for the consequences that its filing imposed on the defendant. It often will be "difficult to divide the hours expended on a claim-by-claim basis," *Hensley*, 461 U.S. at 435, because most plaintiffs—unlike petitioner here—will not litigate the frivolous

Section 1983 claims to the practical exclusion of the nonfrivolous claim. And because the filing of a Section 1983 claim substantially raises the stakes, it will often lead to a greater number of hours "devoted generally to the litigation as a whole." *Ibid.*; see *Smith* v. *Wade*, 461 U.S. 30, 90 (1983) (Rehnquist, J., dissenting) (recognizing the "difference between the incentives that are present in state tort actions, and those in § 1983 actions" because of attorney's fee awards). Under petitioner's rule, those substantial additional burdens will be subsumed into "general" work on the litigation.

Petitioner's rule would also spawn endless litigation in district courts over whether particular hours are "directly and exclusively attributable" (Pet. Br. 55) to a frivolous civil rights claim. Appeals would follow, creating more of "one of the least socially productive types of litigation imaginable": litigation over fees. *Hensley*, 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part). Such litigation would "frustrate the purposes of § 1988," *ibid.*, and ignore the district court's "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters," *id.* at 437.

B. In Any Event, The Lower Courts Correctly Held That The Fees Awarded Here Were Traceable Exclusively To The Frivolous Section 1983 Claims

1. Even if fees awarded to a prevailing defendant must be traceable exclusively to a frivolous Section 1983 claim, the award in this case still should be affirmed. Petitioner repeatedly acknowledges that this was the very rule stated by the court of appeals

when affirming the district court's fee award. See Pet. Br. 24, 48, 52.

2. Petitioner argues, however, that the Fifth Circuit "misapplied" (Pet. Br. 49) what he views as the correctly stated rule of law. Even assuming that resolving that factbound issue is within the Court's grant of certiorari and would constitute a wise use of the Court's limited resources, but see Part III.B, *infra*, petitioner is incorrect.

a. The district court determined that petitioner pressed his state-law claims only when his frivolous Section 1983 claims failed. See Pet. App. 32a ("[P]laintiff made certain allegations that could be characterized as state law tort claims, but plaintiff did not make these allegations separate from his § 1983 claim."); *ibid.* ("[P]laintiff failed to allege state tort law violations in the Complaint such that defendants were adequately noticed that a separate defense as to these claims would need to be prepared at the beginning of the litigation."). The court of appeals did not disagree with that finding, and there is no basis for this Court to question it.[14]

Nevertheless, petitioner seeks to relitigate the district court's finding by arguing that the state-law claims were "featured prominently in the complaint." Pet. Br. 52. But any state-law claims, far from

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[14] Petitioner's assertion (at 53) that "[t]he court of appeals evidently did not embrace the magistrate's view of the complaint" is wrong. The district court concluded that petitioner's state-law claims were specifically articulated only at the eleventh hour; the Fifth Circuit's characterization of the complaint as "claiming federal and state causes of action," Pet. App. 3a, is entirely consistent with the district court's conclusion.

"featured prominently," were in fact not expressly mentioned at all. See J.A. 37-43 (reproducing complaint). By contrast, the complaint expressly alleged numerous Section 1983 claims, including (among others) claims based on "the right to Due Process" and "the right to seek public office." J.A. 41.

Petitioner acknowledges that "the complaint did not set forth independent counts for each [state-law] claim." Pet. Br. 53. Nonetheless, he invites the Court to dive deeper into the intricacies of this particular case, arguing that *Louisiana's* especially lenient "fact-pleading" standard would not have required him to do so. *Ibid.* But even if the Court were inclined to follow petitioner that far, that still would not answer the question of whether state claims were actually *litigated* in federal court. As both courts below determined, they were not.

b. Those findings are amply supported by the record. Although respondents pleaded state-law defenses in their answers out of an abundance of caution, J.A. 50, 68, 75, petitioner pressed his civil rights claims in federal court to the exclusion of any state tort claims. Petitioner himself described the suit that way shortly after he filed it. See p. 5, *supra*. Likewise, in a series of letters, counsel for petitioner urged respondents to settle the Section 1983 claims but made no mention of state tort claims. See pp. 5-6, *supra*.[15]

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[15] Petitioner claims that he sought summary judgment "on his state law extortion claim." Pet. Br. 54, but that motion centered on his federal civil rights claims. See J.A. 81-83 (citing federal cases); pp. 6-7, *supra* (discussing same). Petitioner also claims that respondents answered the motion "as a matter of state law." Pet. Br. 54. But Vice's response said nothing about state

In fact, petitioner did not expressly *articulate* any state tort claims until *after* respondents sought judgment on the Section 1983 claims. The district court then swiftly dismissed the Section 1983 claims and refused to exercise supplemental jurisdiction over any state tort claims that had emerged. Pet. App. 40a. In dismissing the claims, the district court emphasized that it had "had minimal involvement with the state law claims." *Ibid.*

It was with these facts before it that the district court expressly found that "throughout the litigation, the focus of both plaintiff and defendants" was petitioner's frivolous civil rights claims. Pet. App. 32a-33a. The court of appeals affirmed this finding, emphasizing that the district court had "specifically restricted its award of attorneys' fees to the proceedings before it" and had "noted that '[respondents did] not appear to request attorney's fees related to the defense of the state law claims.'" *Id.* at 12a. "[B]ecause the court found that *Appellees did not seek attorneys' fees for the defense of the state law claims*," the court of appeals specifically explained, "we do not find its award of attorneys' fees an abuse of discretion." *Ibid.* (emphasis added). Under these circumstances, it was within the district court's discretion to award respondents the fees they incurred in defending the frivolous civil rights claims,

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law claims. J.A. 89-103. And the Town explicitly noted at the end of its response that "[p]laintiff does *not* specifically set forth any state law claim in his Petition for Damages." J.A. 122 (emphasis added).

even though they "faced the prospect," Pet. Br. 51, of defending state tort claims in the future.[16]

III. If The Judgment Below Is Not Affirmed Outright, The Writ Of Certiorari Should Be Dismissed As Improvidently Granted

Petitioner sought—and this Court granted—review of two carefully described legal questions. The first was whether a defendant who obtains a dismissal of a frivolous claim under a statute that triggers eligibility for fee-shifting under Section 1988 is categorically ineligible for such fees whenever "the plaintiff has asserted other interrelated and non-frivolous claims." Pet. i. The second was whether a defendant who is eligible for fees may recover for time "spent defending non-frivolous claims that were intertwined with the frivolous claim." *Ibid.*

Having obtained a writ of certiorari on the premise that this case offered an opportunity to resolve a "deep and entrenched conflict" (Pet. 28) that has led to "a patchwork of legal rules" (Pet. Reply 6), petitioner has shifted gears and now invites this Court to resolve several case-specific issues. Despite acknowledging that he never sought review of the court of appeals' holding that his Section 1983 claims were frivolous (Pet. Br. 26 n.2), petitioner's merits brief devotes substantial energy to attempting to re-

[16] Petitioner makes much of the district court's statement that "[a]ny trial preparation, legal research, and discovery" in federal court "may be used by the parties in the state court proceedings." Pet. Br. 4-5, 16-18, 32, 54-55. But, even if such a statement were somehow binding on the state court, it does not undermine the court's detailed findings about what actually happened in federal court.

argue that threshold and concededly "fact-bound" (*ibid.*) question. See *id.* at 38-42; see also pp. 52-53, *infra*. Similarly, the petition attacked "[t]he *rule* adopted by the Court of Appeals" for determining the amount of a fee award to a prevailing defendant in situations where concededly frivolous claims are intertwined with nonfrivolous ones. Pet. 19 (emphasis added); see Pet. 21, 23. But petitioner's brief on the merits now declares that "the court of appeals announced the correct rule" (Pet. Br. 25) and shifts to arguing that the court of appeals' error lies instead in how it *applied* that rule to the particular facts of his case (*id.* at 32).

This Court should decide this case on the premises on which review was granted, and it should affirm the court of appeals' judgment for the reasons stated above. In the alternative, the Court should dismiss the writ of certiorari as improvidently granted. Petitioner is asking this Court to decide questions that are not within the grant of certiorari and that would not have warranted certiorari had petitioner sought it on those grounds. This Court's review of difficult legal questions is not facilitated by a process that treats their essential premises as moving targets.

A. Dismissal Is Warranted Because Petitioner Now Disputes The Premise Of Frivolousness On Which Certiorari Was Granted

1. In seeking this Court's review, petitioner made a calculated gamble. Before the lower courts, petitioner unsuccessfully argued that his Section 1983 claims were not frivolous. Pet. App. 8a. He could have pressed the argument before this Court as well. Instead, petitioner apparently concluded that

challenging the lower courts' "fact-bound" frivolousness determination (Pet. Br. 26 n.2) would decrease his chances of securing a writ of certiorari. See S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

Instead, petitioner embraced the court of appeals' frivolousness determination as the predicate for his request for certiorari. Both questions (as presented in the petition) were premised on the notion that this case included both frivolous and nonfrivolous claims. Question 1 spoke of "*other* interrelated and *non-frivolous* claims" and inquired whether the presence of such claims posed an absolute bar to any award of attorney's fees to a prevailing defendant. Pet. i (emphasis added). Question 2 was even clearer, asking whether it was improper for the courts below to award fees "spent defending non-frivolous claims that were intertwined with *the frivolous claim*." *Ibid.* (emphasis added).

Petitioner does not assert that either of these questions "fairly included" the issue of whether his Section 1983 claims were in fact frivolous. S. Ct. R. 14.1(a). And although petitioner notes that the body of the petition concluded with a brief argument that the court of appeals misapplied the *Christiansburg* standard in determining that his dismissed claims were frivolous, Pet. Br. 26 n.2 (citing Pet. 25-28), petitioner does not (and could not) contend that such a reference could expand the scope of this Court's grant of certiorari. See *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954) ("The fact that the issue was mentioned in argument does not bring the question properly before us."); see EUGENE GRESSMAN ET AL.,

SUPREME COURT PRACTICE 464 (9th ed. 2007) (collecting cases).

2. Petitioner's merits brief reframes the questions presented to remove the most express acknowledgement that his dismissed Section 1983 claims were frivolous. Compare Pet. i with Pet. Br. i (rewriting Question 2 to remove the words "frivolous" and "non-frivolous"). The bulk of the brief also revolves around various attacks—some subtle, some direct—on the lower courts' fact-bound determination of that issue.

Petitioner's strategy is evident throughout his dramatic Introduction and Statement of Facts, and in his Argument. In each, petitioner devotes substantial effort to contending that his Section 1983 claims not only were *not* frivolous, but actually *meritorious*. Pet. Br. 3-4, 6, 8-13, 22-23, 26, 37-42. On petitioner's re-telling, this case is no longer about frivolous claims at all; instead, it involves claims that were "withdraw[n]," "voluntarily dismissed," or "abandon[ed]." *Id.* at i, 16, 43. Even a rare acknowledgement that "this appeal is premised on the assumption that the § 1983 claim was frivolous," *id.* at 26, is followed immediately by an assertion that "the errors of the courts below [on the frivolousness question] provide cautionary tales that are instructive in crafting the correct legal rule," *id.* at 26 n.2.

Because petitioner's arguments rely heavily on his views about a threshold issue that is undisputedly not before the Court, the prudent course would be to dismiss the writ of certiorari as improvidently granted. *See Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 105 (2001) (per curiam) (dismissing writ because judgment on the merits would require the Court to rule on a threshold question decided below but not presented in the petition for certiorari).

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (per curiam) (noting the Court's "disapprov[al of] the practice of smuggling additional questions into a case after we grant certiorari") (internal quotation marks and citation omitted); *Norfolk Southern Ry. Co.* v. *Sorrell*, 549 U.S. 158, 164-165 (2007) (same).

3. Petitioner's *method* for challenging the lower courts' frivolousness determination also is improper. When arguing before the district court that his Section 1983 claims were not frivolous, petitioner relied exclusively on the four corners of his complaint. Pet. App. 8a n.19, 20a-21a. When the case reached the court of appeals, however, petitioner attempted to change course by presenting evidence and inferences accumulated during discovery. *Id.* at 8a n.19. But the court of appeals concluded that petitioner had "abandoned the[m] at the district court" level. *Ibid.* That forfeiture holding went entirely unchallenged in the petition.

As a result, petitioner's bid to persuade this Court that his claims were not frivolous—and, more generally, to color the actual questions of law at issue—relies heavily on "facts" not considered by either court below. For example, petitioner's complaint (again, the only document considered by either court in determining frivolousness) accused respondent of sending an anonymous letter "threatening to take certain actions." J.A. 39. In contrast, petitioner's merits brief contains additional accusations designed to vilify Vice, including that Vice allegedly contacted petitioner's former supervisor to obtain information about him and tried to leak an anonymous letter to the press. Pet. Br. 6, 8. Similarly, whereas the complaint accused Vice of

conspiring to direct a confrontation between petitioner and another individual. J.A. 39. petitioner's merits brief asserts that Vice promised the man leniency in exchange for his cooperation and that one of Vice's officers dictated the man's official complaint. Pet. Br. 9-12. Given the uncertain record and petitioner's impermissible use of evidence, this case would be a particularly poor vehicle for resolving the issues at hand—*even if* this Court were inclined to entertain petitioner's assertion that the lower courts' frivolousness determination is somehow "instructive." *Id.* at 26 n.2.

B. Dismissal is Warranted Because Petitioner Now Asserts That The Fifth Circuit "Stated The Correct Rule" About Calculating A Fee Award To A Prevailing Defendant

1. When seeking certiorari, petitioner repeatedly attacked the *rule* adopted by the Fifth Circuit for calculating the amount of a fee award to a prevailing defendant. See Pet. 19 ("[t]he rule adopted by the Court of Appeals lowers the bar for Section 1988 defendants to recover fees in a number of ways"); Pet. 19-23 ("the rule adopted by," "the rule set forth by," and three references to "[t]he Court of Appeals' rule"). In his merits brief, however, petitioner *acknowledges* that "[t]he court of appeals stated" what he regards as "the correct rule"—*i.e.*, that a prevailing defendant should be awarded only fees that are "directly and exclusively attributable to a frivolous claim." Pet. Br. 24; accord *id.* at 48 (same).

Because of that concession, the second question stated in the petition for a writ of certiorari is not properly presented. The petition asked: "Is it improper to award defendants all of the attorney's fees

they incurred in an action under Section 1988, where *the fees were spent defending non-frivolous claims* that were intertwined with the frivolous claim?" Pet. i (emphasis added). But, as petitioner now acknowledges, the Fifth Circuit's answer is the same as his: yes. Accord Pet. App. 11a ("[A] defendant is only entitled to attorneys' fees for work which can be *distinctly* traced to a plaintiff's frivolous claims.") (emphasis added); *id.* at 12a ("[T]he district court will be able properly to weigh and assess the amount of attorney's fees attributable *exclusively* to a plaintiff's frivolous *** claims.") (internal quotation marks, citation, and alteration omitted) (emphasis added).

2. Perhaps recognizing the significance of a merits-stage concession that "[t]he court of appeals stated the correct rule" (Pet. Br. 24), petitioner attempts to redraft his own second question presented to focus on the "effort" a district court must expend "to isolate the fees" "attributable to" a dismissed claim from those that are not. *Id.* at i. That is no answer. The scope of this Court's review is determined by the questions set forth in the petition; a party may not simply remake a question to remedy a defect in his case. *Izumi*, 510 U.S. at 34; S. Ct. R. 24.1(a) ("The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari *** but the brief may not *** change the substance of the questions already presented in those documents."). Petitioner did not seek — and this Court did not grant — review to determine whether the district court expended sufficient "effort" in determining that the fees were exclusively attributable to the frivolous Section 1983 claims.

3. Even had it been properly presented, petitioner's reframed question would not have merited

this Court's review. Petitioner has not claimed any split of authority regarding how much "effort" a court must expend in attempting to isolate fees exclusively attributable to frivolous claims.

Petitioner asserts that his particular frivolous and nonfrivolous claims were "factually intertwined" — *i.e.*, so inextricably linked that "[t]his was a single, indivisible tort suit." Pet. Br. 31. The Fifth Circuit disagreed, concluding that petitioner's claims were not so "intertwined" as to prevent the magistrate judge from identifying and awarding only fees "exclusively" and "distinctly" traceable to the frivolous civil rights claims. Pet. App. 11a-12a. Nor did the court of appeals question the district court's "effort." Rather, the Fifth Circuit stated that district courts have discretion to "weigh and assess" the appropriate award in such circumstances, and it concluded that the district court did not abuse its discretion in finding "that [respondents] did not seek attorneys' fees for the defense of the state law claims." *Id.* at 12a.

In arguing otherwise, petitioner leans heavily on Judge Southwick's partial dissenting opinion. Pet. App. 12a-18a, but that reliance is misplaced. All three judges agreed that the district court was required to parcel out fees that were exclusively traceable to frivolous claims; their "narrow" disagreement (*id.* at 12a) concerned only whether the district court actually did so. Judge Southwick read the magistrate's opinion to say it need not "allocate the fees separately between the successful claims and the unsuccessful * * * because the claims were found to be too interrelated." *Id.* at 13a. In contrast, the majority concluded that the district court "found that [respondents] did not seek attorneys' fees for the

defense of the state law claims," and that the only fees awarded were "exclusively" and "distinctly" traced to frivolous claims. *Id.* at 11a-12a.[17]

Petitioner's dispute is not with the legal rule adopted below but with the district court's application of it to his particular claims. Petitioner's reframed second question presented is thus a classic request for factbound error correction, turning on an examination of the pleadings, correspondence, discovery, and billing records. This Court typically does not wade into such matters, particularly when the ultimate question is merely whether the district court abused its discretion in examining the same materials. Such reluctance would be particularly appropriate here, where the inquiry would turn in large part on the extent to which petitioner properly pleaded his state-law claims under Louisiana's idiosyncratic civil law system. See Pet. Br. 54.

CONCLUSION

The judgment of the court of appeals should be affirmed. Alternatively, the writ of certiorari should be dismissed as improvidently granted.

[17] Notably, Judge Southwick acknowledged that the majority did not "refer" to decisions he deemed misguided on the need to segregate fees. Pet. App. 15a.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton, and TOWN OF VINTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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10290
89

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. A DEFENDANT IS NOT ENTITLED TO FEES FOR A FRIVOLOUS FEDERAL THEORY THAT WAS FACTUALLY INTERTWINED WITH SURVIVING NON-FRIVOLOUS THEORIES 2

A. Defendants Ignore This Court's Consistent Approach to Interpreting Fee-Shifting Provisions 2

B. The "Equitable Considerations" Weigh Against Awarding Defendants Fees Where a Frivolous Claim Is Intertwined With the Surviving Claims 6

1. The burdens on defendants are minimal 6

2. The threat of punishing plaintiffs for including a federal legal theory will chill the very litigation Congress wished to encourage 12

3. Defendants' rule will unduly burden the courts with ancillary litigation 15

II. THE COURT OF APPEALS ERRED IN AWARDING DEFENDANTS ALL THEIR FEES WITHOUT ANY REQUIREMENT OF SEGREGATING THE FEES THAT WERE ATTRIBUTABLE EXCLUSIVELY TO THE DISMISSED CLAIM 16

A. This Case Continues to Present a Stark Choice—Now Among Three Distinct Rules 16

B. The But-For Test Most Satisfies the "Equitable Considerations." 19

C. The Fee Award Must Be Vacated Under Either Standard 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Bd. of the Cnty. Comm'rs v. Brown,
520 U.S. 397 (1997) 11

Buckhannon Bd. & Home Care, Inc. v. W. Va. Dep't of Health & Human Resources, 532 U.S. 598 (2001) 4

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 3, 6, 7, 19, 20

City of Riverside v. Rivera,
477 U.S. 561 (1986) 18

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 15

Crawford-El v. Britton,
523 U.S. 574 (1998) 12

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) 12

Hanrahan v. Hampton,
446 U.S. 754 (1980) 4

Hensley v. Eckerhart,
461 U.S. 424 (1983) ..... *passim*

Indep. Fed'n of Flight Attendants v. Zipes,
491 U.S. 754 (1989) 4, 6

Kay v. Ehrler,
499 U.S. 432 (1991) 4

Martin v. Franklin Capital Corp.,
546 U.S. 132 (2005) 4

Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984) 7

Monell v. New York City Dep't of Soc. Servs.,
436 U.S. 658 (1978) 11

Oliveri v. Thompson,
803 F.2d 1265 (2d Cir. 1986) 8

FEDERAL STATUTES

42 U.S.C. § 1988 3

MISCELLANEOUS

Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65 (1996) 13

2 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION § 10.3 (3d ed. 1997) 11, 12

RESTATEMENT (SECOND) AGENCY § 219 (1958) 10, 11

REPLY BRIEF FOR PETITIONER

INTRODUCTION

If this were a contest for who could design a standard that would be most likely to discourage a plaintiff from including a meritorious, but untested, civil rights theory in an otherwise meritorious lawsuit, Defendants would win hands down. Under their rule, a judge calculates the reasonable fee *for the entire case*. Then, the judge decides whether to make the plaintiff pay that entire sum, based mainly on the defendant's "degree of success" so far. But in Defendants' view, the measure of "success" does not depend on whether the defendant has reduced its financial exposure (or other risk) by defeating the federal claim. And the ultimate award does not depend on whether the federal theory has saddled the defendant with any incremental burden. This rule has nothing to do with the reason Congress authorized prevailing defendants to recover fees: to compensate for *burdens* imposed by frivolous litigation.

There is ordinarily no reason to impose fees on a plaintiff who has merely included a federal theory along with other theories; the inclusion of an additional theory rarely imposes much by way of incremental burden. It should take a diligent defendant little effort to lop off a federal claim if it truly is frivolous.

But if it is ever appropriate to award fees in that circumstance, the fees should be tethered to the harm incurred—the actual incremental burden that the frivolous claim imposed. To the extent that the defendant would have done work anyway in the ab-

sence of the federal claim—and certainly to the extent that the fruits of that labor are still usable in the ongoing litigation—the defendant should not be compensated for the effort that was not wasted.

ARGUMENT

I. A DEFENDANT IS NOT ENTITLED TO FEES FOR A FRIVOLOUS FEDERAL THEORY THAT WAS FACTUALLY INTERTWINED WITH SURVIVING NON-FRIVOLOUS THEORIES.

As much as Defendants want to ignore it, this Court has taken a consistent approach to crafting fee-shifting rules: It has routinely adopted categorical rules based upon various "equitable considerations," and has never given primacy to parity between prevailing plaintiffs and prevailing defendants. *See infra* Point I.A. The "equitable considerations" compel the conclusion that defendants should not recover fees where the frivolous legal theory is factually intertwined with the surviving theories. *See infra* Point I.B.

A. Defendants Ignore This Court's Consistent Approach to Interpreting Fee-Shifting Provisions.

Defendants' position revolves around five themes—each of which represents a frontal assault on this Court's precedent.

Statutory language. Defendants declare that "[t]he statutory text imposes only two threshold requirements: The suit must be an 'action or proceeding to enforce' one of the specified statutes, and the party seeking fees must be a 'prevailing par-

ty.'" Resp. 18 (quoting 42 U.S.C. § 1988(b)). Defendants accuse Mr. Fox of "largely ignor[ing] the terms of the statute." Resp. 24. The accusation is both misdirected and outdated. More than 30 years ago, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), this Court interpreted the statute to impose an additional threshold requirement that Congress did not explicitly write: No prevailing defendant may recover fees without also demonstrating that "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983). That reading drastically diminishes the universe of "prevailing" defendants who are eligible for fees. The issue here is what are the precise contours of that already small subset. The sparse statute does not help answer that question.

Parity. In a paean to parity, Defendants repeatedly point to the precepts for prevailing plaintiffs and insist that "[t]he same should be true for defendants." Resp. 22; *see also* Resp. 3, 41. Defendants ignore this Court's repeated pronouncements that prevailing defendants occupy a very different status in the statutory scheme from plaintiffs. *See* OB 30. That difference in status means that "[a] successful defendant seeking counsel fees ... must rely on quite different equitable considerations," *Christiansburg*, 434 U.S. at 419, which translate into different rules. *See* OB 36. Because Defendants ignore this clear holding, they offer no compelling basis to make this case the rare exception to the rule of differential treatment.

Discretion. Defendants prefer rules that give "district court[s] ... discretion to award fees" over

rules that make it "categorically impermissible for a district court to award fees" under certain circumstances. Resp. 18, 30. Discretion *über alles* has never been the controlling principle in establishing the rules governing fee awards, and it should not be here: Because "limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike ..., [this Court] ha[s] often limited courts' discretion to award fees despite the absence of express legislative restrictions." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005); *see Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989).[1] The most relevant example, again, is *Christiansburg*, which makes it "categorically impermissible" for a judge to award fees to the vast majority of prevailing defendants. Defendants ignore all the cases that belie their theme.

Prior precedent. Without any hint of irony, Defendants accuse Mr. Fox of "ignor[ing] ... this Court's decisions"—specifically, *Hensley*—"explicating when a party is eligible for fees." Resp. 24. *Hensley* was not ignored, *see* OB vii; it was inapposite—at least as to this question. *Hensley* involved a partially prevailing *plaintiff* and prescribed a plaintiff-specific

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[1] *See, e.g., Buckhannon Bd. & Home Care, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 602 (2001) (categorical rule denying fees where relief is achieved by independent legislative action); *Zipes*, 491 U.S. at 761 (categorical rule denying fees against intervenors except "where the intervenors' action was frivolous"), *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (categorical rule limiting interim fee awards to parties who have prevailed on the merits of at least some claims); *Kay v. Ehrler*, 499 U.S. 432, 437-38 (1991) (denying fees to prevailing party who was a *pro se* attorney).

rule that depended entirely on attributes that are unique to plaintiffs: (1) the congressional imperative to encourage and reward "challenges to institutional practices or conditions," 461 U.S. at 436; and (2) the observation that *plaintiffs* "in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee," *id.* at 435. None of that reasoning applies to defendants.

Nevertheless, Defendants insist that "[t]he Court hardly could have been clearer" that it was deciding the rule for defendants as well by cramming an intricate equitable analysis into a 17-word footnote. Resp. 20. Assuming such a feat of concision were possible, that is not what this footnote does. In the relevant text, the Court addressed "cases [where] a plaintiff may present in one lawsuit distinctly different claims for relief *that are based on different facts* and legal theories," and twice repeated a reference to "*unrelated*" claims. 461 U.S. at 434-35 (emphasis added). Then came the footnote: "If the unsuccessful claim is frivolous, the defendant may recover attorney's fees incurred in responding to it." *Id.* at 435 n.10.

Defendants protest that "the Court's references to ... 'separate lawsuits' are not in the relevant footnote," Resp. 21, which is rather like a passenger saying he's not technically "in" Washington (but "under" it) as the Metro pulls into Union Station. The reference to "*the* unsuccessful claim" must mean *the unsuccessful claim described in the text*—the one that is "unrelated" to the successful claim and "based on different facts and legal theories." 461 U.S. at

435. No lower court, including the panel below, has ever read that footnote as resolving the issue where claims are factually intertwined. *See, e.g.*, P.A. 11 n.25.

"Equitable considerations." Finally, Defendants fault Mr. Fox for an analysis that "begins and ends with what he describes as the equitable considerations that underlie this Court's attorneys' fees decisions." Resp. 24 (quoting OB 31; internal citations and quotation marks omitted). That is not *our* description; it is *this Court's*. In deciding to treat defendants and plaintiffs differently, *Christiansburg* began and ended its analysis with the "equitable considerations" that motivated Congress. *Christiansburg*, 434 U.S. at 419. There is no getting around the principle that "[h]ere as elsewhere, the judicial role is to reconcile competing rights that Congress has established and competing interests that it normally takes into account." *Zipes*, 491 U.S. at 765. We turn next to that reconciliation.

B. The "Equitable Considerations" Weigh Against Awarding Defendants Fees Where a Frivolous Claim Is Intertwined With the Surviving Claims.

The "equitable considerations" that this Court has identified make a compelling case against awarding fees in this context.

1. The burdens on defendants are minimal.

Defendants exaggerate both the burden that defendants generally shoulder when a frivolous legal theory is nestled among otherwise meritorious

claims and the likelihood that our proposed rule will cause an epidemic of frivolous theories.

Burden of an extra federal theory. First, some common ground: Defendants concede that *the* reason Congress authorizes a defendant to recover fees is "to protect defendants from *burdensome* litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420 (emphasis added) (quoted in Resp. 32). They do not dispute the corollary: Where a claim does not appreciably increase the litigation burden on the defendant, a fee award is unjustified. And finally, Defendants do not appear to dispute that a stand-alone frivolous suit (or a factually distinct federal claim, which might as well be a separate lawsuit) is generally much more burdensome than a federal theory that is factually intertwined with meritorious claims. "Although it is costly to defend against a frivolous suit, the marginal costs of knocking out the frivolous claims in a suit that has a meritorious core usually are not great." *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1168 (7th Cir. 1984). Defendants merely dispute just how much lower that marginal cost typically is.

For two reasons, the incremental burden in cases like this one is minimal. First, the defendant can almost always get the court to dismiss the frivolous federal claim founded on a meritorious factual core early in the case. After all, the meritorious factual core is the same. So when a frivolous claim is factually intertwined with surviving claims, the basis for the finding of frivolousness will almost always have to be—as it was here—that the theory is *legally* frivolous on its face.

It does not take much work to skewer a frivolous federal theory at the pleading stage. If a defendant fails—as Defendants here did—to take that simple step, they should not be heard to complain about discovery burdens arising from the federal theory. "As a general principle, it would be inequitable to permit a defendant to increase the amount of attorneys' fees recoverable as a sanction by unnecessarily defending against frivolous claims which could have been dismissed on motion without incurring the additional expense." *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986).

This is the point Defendants elide when they assert that § 1983 claims entail "significant additional discovery" to determine facts that are irrelevant under general tort law, such as "[w]hether a defendant acted 'under color of law'" and "whether a municipality maintained an 'official policy or custom.'" Resp. 37. If the legal theory is frivolous on its face, the defendant never needs discovery either on color of law or custom and policy.

At points, Defendants seem to be arguing that there may be times when discovery is necessary to discern the frivolousness of the federal theory even though the basic factual foundation is sound. Their point seems to be that there might be occasions where *the reason* a federal claim is frivolous is that the plaintiff is trying to hold the municipality liable for a tort for which it cannot be liable, because the tortfeasor was not acting in an official capacity or because the tortfeasor was not a policymaker and was not following a municipal policy or custom. In fact, they offer that excuse for failing to move to

dismiss the purportedly frivolous claim on the pleadings in this case. *See* Resp. 28 n.9.

Defendants do not even try to square that assertion with their "repeat[ed]" refrain "that the district court expressly rejected petitioner's argument that 'discovery issues impaired his determination of whether he had a viable 42 U.S.C. § 1983 case.'" Resp. 27 n.8 (quoting P.A. 26a). But the more fundamental point transcends the facts of this case: On the one hand, if Mr. Fox (or any other plaintiff) should have known the theory was frivolous from inception, then Defendants should have too. If, however, they needed discovery to figure out the theory's flaws—e.g., whether Chief Vice was a policymaker or whether his criminal conduct was directed by a policymaker—then so did Mr. Fox. Surely, the plaintiff should not be expected to know more than the defendant about whether the tort went all the way up to the mayor or about what customs infuse city hall.

The incremental burden is minimal in these circumstances for another related reason: When all the theories arise from the same nucleus of operative facts, the parties must necessarily conduct almost exactly the same fact discovery with or without the federal theory. In most cases, it will be evident, as it was to the original magistrate in this case, that "[a]ny trial preparation, legal research, and discovery may be used by the parties" on one or more of the state claims. P.A. 40a. Defendants have never pointed to a single deposition that they would not have taken—or a single document they would not

have scoured—had the complaint pled only state claims. *See* OB 32.[2]

Instead, Defendants point to comparatively trivial effects of adding a frivolous legal theory. First, they assert that a lawsuit with a § 1983 claim "weighs far more heavily on defendants than one without." Resp. 36. That makes no sense. What "weighs ... heavily on defendants" is the prospect of losing large sums of money (or being subjected to burdensome injunctive relief, as the case may be). Rarely would a defendant confronting massive liability say, "Phew, good thing the plaintiff did not include a theory of federal law." And a warden confronting a prisoner's trivial complaint will not lose sleep just because the prisoner throws in a federal theory along with other claims.

True, "the risk of paying a fee award" to a *successful* plaintiff might incrementally raise the stakes, Resp. 36; that is one consequence for violating the law. But rarely does the fee award "dwarf the damages claimed." Resp. 36. More importantly, if, as Defendants insist, "there is no mistaking frivolous claims for meritorious ones," Resp. 14, then a

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[2] Even on the elements that are unique to federal claims, discovery will typically be valuable. For example, a plaintiff suing a governmental employer under any tort theory would be eager to know whether the employer had an official policy encouraging the employee's wrongdoing or whether the employee was acting within his official capacity. *See, e.g.*, RESTATEMENT (SECOND) AGENCY § 219 (1958) (master subject to liability for acts outside scope of employment where master intended the conduct or consequences, or servant purported to speak on behalf of principal and relied on apparent authority).

defendant should know a frivolous federal theory when he sees one and rest assured that it will not expose him to having to pay his adversary's legal fees.

Second, Defendants assert that frivolous § 1983 claims allow "plaintiffs ... to drag municipal defendants into cases where they do not belong." Resp. 36. That is also wrong. A plaintiff challenging a public official's misconduct can hold the municipality liable in tort merely because its agent acted "in the course of exercising a power delegated to the municipality by local law." *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 417 (1997) (Souter, J., dissenting). The plaintiff need not plead or prove that the municipality had adopted a policy or custom of tortious conduct. *See* RESTATEMENT (SECOND) AGENCY § 219 (1958) (master liable for torts of servants committed while acting in the scope of employment, regardless of policy or custom). In contrast, "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Thus, municipalities always face the risk of "a personal dispute with a government employee" morphing into a lawsuit against the deep-pocketed governmental employer, Resp. 36, but frivolous § 1983 claims do not *increase* the risk.

The forecasted epidemic. Defendants predict that denying fees in a case like this will unleash an epidemic of frivolous federal theories appended to otherwise meritorious complaints. Resp. 32. These fears, too, are overwrought. The rule we espouse has long been "the overwhelmingly predominant view of the courts." 2 MARTIN A. SCHWARTZ & JOHN E. KIR-

KLIN, SECTION 1983 LITIGATION § 10.3, at 482-83 & n.46 (3d ed. 1997) (citing numerous cases). Yet no epidemic has materialized.

The main basis of Defendants' forecast is that "[a] plaintiff hoping to avoid a fee award would need only add a related, nonfrivolous cause of action ... as part of his lawsuit." Resp. 35. That is backwards. A plaintiff who has been wronged will plead the meritorious claim because he wants to win the case, not because he wants to game attorneys' fees on a theory he cannot win.

More important, there are already strong deterrents to larding otherwise meritorious lawsuits with frivolous federal theories. Most notably, "Rule 11 ... adequately protects defendants from frivolous allegations," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987), and also "protect[s] public officials from undue harassment," *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998). Defendants downplay Rule 11's deterrent value by noting it is "not a fee-shifting statute," but instead "aimed at curbing abuses." Resp. 40 (citation omitted). But *their* central point is that § 1988 should apply in these circumstances *to curb abuses*. Both Rule 11 and § 1988 punish frivolous claims and both compensate defendants for the same burden; the only difference is who writes the check.

2. The threat of punishing plaintiffs for including a federal legal theory will chill the very litigation Congress wished to encourage.

In support of their position that the threat of sanctions "chills nothing that is worth encouraging,"

Resp. 25 (internal quotation marks and citation omitted). Defendants catalog all the rules that *should* restrict a court from finding a claim frivolous. Resp. 25-30. The rulebook would be comforting if all plaintiffs and lawyers shared Defendants' faith in judicial infallibility. But the lawyers in the trenches—across the ideological spectrum—confirm that they do not. Resp. 18; *see* ACLU Br. 25-29; Liberty Br. 9-13. And the hard data show that trial courts get it wrong about one out of five times. *See* ACLU Br. 26 (citing Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 94 (1996)). Those are horrible odds, especially for a vulnerable population.

This case illustrates the problem. The rule that "a claim is not frivolous simply because it has been 'abandoned,'" Resp. 26 (citation omitted), did not help Mr. Fox: That was precisely *why* the magistrate awarded fees. *See* P.A. 6a-7a, 26a; OB 38-42.

Even while insisting (correctly) that the issue of frivolousness is not before this Court, Defendants spill quite a bit of ink trying to demonstrate that the courts below were justified in ruling the federal theory frivolous. *See, e.g.*, Resp. 7-8, 28, 36, 37-38. But their argument tacitly proves otherwise: They do not even try to defend the basis on which the lower courts awarded fees, substituting a completely different basis—and one that (if true) could only have been discerned after discovery.[3] If the magi-

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[3] *Compare* P.A. 3a (court of appeals upholds fees because counsel conceded (1) that anonymous action cannot be "under color of state law", and (2) that there is no First Amendment

strate's rationale had been defensible, Defendants would have defended it.

As our opening brief observed, the lapses of the courts below "provide cautionary tales that are instructive in crafting the correct legal rule." OB 26 n.2. The illustration is not an improper effort to "shift gears" away from "the premises on which review was granted." Resp. 48-49. No premise has changed. Mr. Fox's petition argued at length that "the Court of Appeals misapplied this Court's precedent ... in finding that Mr. Fox's claims were frivolous." Pet. 25-28. In any event, an illustration is not improper just because it is drawn from the very record this Court is scrutinizing. Defendants themselves, repeatedly cite the specifics of the allegations of frivolousness for the same illustrative purposes. *See, e.g.*, Resp. 28, 36, 38 (using the allegations of frivolousness here "for example" to illustrate three different points about what the rule should be); Resp. 27 n.8 (another illustration).

Finally, none of this even begins to account for the increased chilling that will result inevitably once the defense bar responds to the new opportunity to win windfall fee awards. *See* OB 46-47.

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deprivation where a state official tries to interfere with a campaign for public office, but fails), *and* P.A. 26a (same for magistrate), *with* Resp. 36 (asserting that "one of the principal reasons why petitioner's claims were frivolous" was the failure to allege that Vice's conduct was the product of a 'policy or custom' adopted by the Town," without noting that the Chief of Police could well have been a policymaker), *and* Resp. 7, 28 (same).

3. Defendants' rule will unduly burden the courts with ancillary litigation.

Defendants agree that a key consideration is which rule will more effectively reduce ancillary litigation over fees. Resp. 44. There is no contest on that one. Whereas the potential windfall for Defendants will encourage much more ancillary litigation under Defendants' rule, our rule appropriately eliminates fee-shifting litigation in an entire category of cases.

Defendants' only response is that courts applying our proposed rule will have "'difficulty ... distinguishing between legal and factual issues.'" Resp. 37 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990)). But our rule does not implicate that distinction. The courts must merely be able to discern whether two (or more) causes of action arise from the same nucleus of operative facts. Courts have wide experience with that question.

* * *

In echoing Congress's concern about chilling meritorious federal claims, we are not suggesting that § 1988 should "be read to encourage litigation at all costs." Resp. 31 n.11. This case boils down to a situation where a rule can advance Congress's goals and relieve courts of ancillary litigation, *at no cost*.

II. THE COURT OF APPEALS ERRED IN AWARDING DEFENDANTS ALL THEIR FEES WITHOUT ANY REQUIREMENT OF SEGREGATING THE FEES THAT WERE ATTRIBUTABLE EXCLUSIVELY TO THE DISMISSED CLAIM.

If Defendants are entitled to *some* of their attorneys' fees, the next question is what standards govern the amount to be awarded. Three rules are on the table—our proposed "but-for" standard; a very different "main focus" standard applied by the panel majority; and Defendants' proposed "degree of success." *See infra* Point II.A. The but-for standard best satisfies the "equitable considerations." *See infra* Point II.B. But the judgment must be vacated whether the Court adopts our standard or Defendants'. *See infra* Point II.C.

A. This Case Continues to Present a Stark Choice—Now Among Three Distinct Rules.

Defendants assert—however tentatively—that the second question presented in the petition "*appears* to be no longer presented in this case because petitioner now concedes that the court of appeals 'stated the correct rule.'" Resp. 41 (quoting OB 48) (emphasis added). They are wrong. As is evident from the context, our opening brief pointed out that the panel majority uttered one correct sentence, but everything it said thereafter "transform[ed]" the rule into a very different standard than the one we propose. OB 48-49. It is also very different from the rule Defendants articulate.

Mr. Fox's "but-for" standard. Mr. Fox proposes a "but-for" standard: "A defendant should recover, at most, fees directly and exclusively attributable to a frivolous claim—fees that would not have been incurred but for the inclusion of the claim." OB 48-49. Under this standard, "[a]ny work that defense counsel would have had to do anyway cannot be the result of the frivolous claim." OB 49. So, a court could never award all the fees without examining the work actually performed and assessing what was attributable exclusively to the frivolous claim and what the defendants would have done anyway to respond to the state claims.

The court of appeals' "main focus" standard. While the panel majority paid lip service to the notion of "work which can be distinctly traced to a plaintiff's frivolous claims," P.A. 11a, the standard it actually applied bore no relation to a but-for standard. The panel never asked whether Defendants would have done the same work even without the federal claim. If it had, there could only have been two answers: Answer 1: "Of course, all of the work would have been done anyway, as the first magistrate observed." Answer 2: "We have no idea, because the second magistrate never even scanned the time entries to distinguish the work exclusively attributable to the federal claim from all the other work—and neither did we."

The majority asked two different questions that are irrelevant to a but-for test. The first was: What was the main "focus of ... the plaintiff and defendants" as they were litigating? P.A. 12a. Who cares? Even if the parties focused mainly on one legal theory, the same efforts would have been necessary

for one or more of the surviving claims. The second question was: For which proceeding are the defendants seeking fees? The panel majority stated that Defendants' "'request for attorney's fees relates only to proceedings before this court'." *Id.* (quoting P.A. 33a). Of course that's true. That was the only proceeding up to that point because the whole case had been removed to federal court. But under a but-for standard the answer is irrelevant.

Thus, this appeal does not raise the "factbound issue" whether the court of appeals reached the wrong result under the correct standard. Resp. 45. This appeal challenges the very standards applied.

Defendants' "degree of success" standard. Defendants propose a two-step process. Step 1: "The district court should first determine a 'lodestar' amount by multiplying the number of hours reasonably expended by a reasonable hourly rate." Resp. 43 (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986)). This will yield a number for how much the *entire* litigation cost the defendant. Step 2: "The court may then adjust that amount up or down by applying various factors, including the degree of success obtained by the prevailing party." Resp. 43. Or it may not. It is totally up to the district court whether to award the defendant all the fees incurred in the case—or even more.

Defendants offer no clue as to what the "various factors" are. More importantly, they do not explain how to calculate the "degree of success" for a prevailing defendant. By logic, a defendant's degree of success would be measured according to how much the defendant has succeeded in diminishing its expo-

sure. But that is not how Defendants define success. After all, they stand to lose much more from the extortion and defamation claims that survive than they ever stood to lose from the claim that they interfered with Mr. Fox's election to a post that he ultimately won. As best we can tell, Defendants believe that "success" is defined only with reference to the proportion of the *federal claims* that survive. *See* Resp. 22. They insist that "[a] defendant forced to defend against a frivolous Section 1983 claim should not have its eligibility for fees turn on whether the plaintiff also brought state-law claims that may or may not have been frivolous," because that would be the "wrong denominator." Resp. 21-22.

Similarly, logic dictates that "success" be defined in terms of what proportion of the total work was devoted to getting the frivolous federal claim dismissed. That is definitely not how Defendants here define it. One of their biggest selling points in favor of their test is that the court *never* has to "'divide the hours expended on a claim-by-claim basis.'" Resp. 43 (quoting *Hensley*, 461 U.S. at 435).

B. The But-For Test Most Satisfies the "Equitable Considerations."

The same "equitable considerations" that govern the decision whether to grant fees at all also govern the overarching standards by which fees should be granted. The but-for test best addresses these considerations—and for many of the same reasons.

To begin, the but-for standard is the only one that bears any relationship to the justification for awarding fees to a prevailing defendant—which is focused on "protect[ing] defendants from" the "*burdens[]*" of

"litigation having no legal or factual basis," *Christiansburg*, 434 U.S. at 420 (emphasis added), and allowing the "defendant the possibility of recovering his *expenses* in resisting ... a groundless action," *id.* at 419 (emphasis added). Defendants' standard bears no correlation at all to the burdens actually imposed on the defendant; it is not even a consideration. Consequently, defendants can—and usually will—win far more in a fee award than what the frivolous legal theory cost them. That is both unjust and inconsistent with § 1988's purpose.

Defendants offer several justifications for their test—all of them off the mark. They begin, again, with the appeal to parity, insisting that the same "principle [that] governs calculation of fee awards to prevailing plaintiffs ... should determine the size of fees awarded to prevailing defendants." Resp. 41. And it is wrong for the same reason. *See supra* at 3. If anything, the presumption should be that they are different.

The parity point is particularly inapt with regard to *Hensley*'s concern that "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." 461 U.S. at 435. When this consideration is applied to a prevailing *plaintiff*, the point is that efforts "devoted generally to the litigation as a whole" will often contribute to the plaintiff's success. *Id.* But where a defendant fends off only a frivolous legal theory—leaving intact other theories based on the same facts—it is highly unlikely that the defendant's "general efforts" will be attributable only to the frivolous claim. Moreover, it is much easier to isolate the efforts made to defeat a frivolous

legal theory than it is to parse out efforts between successful and unsuccessful claims that were nonfrivolous. If a single legal theory is frivolous, a defendant will rarely expend substantial effort to defeat it and whatever effort he takes will usually be distinct from general litigation.

Beyond the parity point, Defendants once again advocate judicial discretion rather than "a categorical rule." Resp. 42. And the answer is the same as it was before: This Court routinely limits discretion to award fees despite the absence of express legislative restrictions. *See supra* at 3-4.

Defendants' only critique of the but-for test is that the effort to attribute expenses to the frivolous claim will "spawn endless litigation." Resp. 44. The but-for standard, however, will spark less litigation than one that revolves around determining the "degree of success" and weighing "various" unstated "factors." Resp. 43. And because the potential rewards under Defendants' rule will be so much richer, the litigation is likely to be more intense and prolonged than litigation over whether some motion or another was attributable exclusively to the federal claim.

C. The Fee Award Must Be Vacated Under Either Standard.

Regardless of which alternative this Court adopts, the fee award must be vacated.

If this Court adopts Defendants' degree-of-success standard, then the district court must be given a chance to apply that standard—which bears no relation to the standard the magistrate applied. *See* OB

48-51. It would make no sense to adopt a standard that is promoted largely on the basis of the district court's "'superior understanding of the litigation,'" Resp. 44 (quoting *Hensley*, 461 U.S. at 437), but then affirm without giving the district court a chance to apply that understanding to a standard it never considered.

If, however, this Court adopts the but-for standard, it must also vacate the fee award. That is not the standard the magistrate applied in this case; she concluded that "segregation" was *not* "required" because the claims were "so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts." P.A. 28a (citation omitted). And, for reasons explained above, that is also not the standard the panel majority applied. *See supra* at 17-18.

Defendants' efforts to salvage the judgment under the but-for standard are unavailing. Defendants argue about how "prominently" the state law claims were "featured ... in the complaint," Resp. 44, and echo the magistrate's observation that the federal theory was "'the focus of both plaintiff and defendants,'" Resp. 47 (quoting P.A. 33a). They do not even try to reconcile these points with (1) their concession that they "pleaded state-law defenses in their answers," Resp. 46; (2) their admission that Mr. Fox "stated that the alleged extortion by Vice constituted a 'civil wrong subject to tort liability and damages,'" Resp. 7; or (3) their request, upon dismissal of the federal claim, that the district court "continue to exercise supplemental jurisdiction over plaintiff's *state law claims*," P.A. 24a (emphasis added).

But in any event, their arguments are misdirected. *See supra* at, 16-18 (explaining why the panel majority's standard differs from the but-for standard). Under the but-for test, only two facts are relevant: (1) the state law claims were in the complaint, as every judge to consider this case has agreed, *see* P.A. 3a, 13a, 32a, 39a; and (2) all the discovery conducted, or at least the vast majority of it, remained relevant to those claims. Both points are evident without a deep "dive ... into the intricacies of ... Louisiana's especially lenient 'fact-pleading' standard." Resp. 46 (emphasis omitted).

In the end, the only work that could possibly qualify under the but-for standard was research Defendants may have conducted to distinguish the different legal standard of liability for municipalities and the motions practice devoted to dismissing the federal claim. Those had to be drops in the bucket compared to the effort devoted to discovery about Chief Vice's scheme to block Mr. Fox from becoming the Police Chief of Vinton. And the fee award, if there is one, should be similarly small.

CONCLUSION

The judgment of the court of appeals should be reversed and the fee award should be vacated.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton, and TOWN OF VINTON,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, IMPACT FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LEGAL AID SOCIETY OF NEW YORK CITY, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NEW YORK, NATIONAL FAIR HOUSING ALLIANCE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND PUBLIC JUSTICE IN SUPPORT OF PETITIONER

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41

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii-vii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. Congress Seeks to Empower Civil Rights Plaintiffs While Deterring Frivolous Lawsuits 8

II. This Court's Jurisprudence, the Federal Rules, and the Reality of Civil Rights Lawyering Already Provide Defendants Appropriate Protection From Frivolous Lawsuits 13

III. The Harsh Fifth Circuit Rule Is Not Necessary to Remedy a Market Imbalance. 18

IV. The Fifth Circuit's Rule Threatens to Chill Civil Rights Plaintiffs from Vindicating Federal Claims 20

V. The Fifth Circuit's Rule Is Particularly Chilling Because Frivolousness Determinations Are Often Unpredictable and Influenced by the Hindsight Effect, as Demonstrated by this Case 25

VI. The Practical Effect of the Fifth Circuit's Rule Will Be to Increase Litigation Over Both Borderline Claims and Attorneys' Fees 29

CONCLUSION 32

TABLE OF AUTHORITIES

FEDERAL CASES: **PAGE(s):**

Blanchard v. Bergeron,
489 U.S. 87 (1989) 8

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465 U.S. 886 (1984) 3

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532 U.S. 598 (2001) 10

Bus. Guides, Inc. v. Chromatic Comme'ns Enters., Inc.,
498 U.S. 533 (1991) 15, 16

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434 U.S. 412 (1978) ..... passim

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505 U.S. 557 (1992) 28

City of Riverside v. Rivera,
477 U.S. 561 (1986) 8, 18, 22

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811 F.2d 1045 (7th Cir. 1987) 21

Eastway Constr. Corp. v. City of New York,
637 F. Supp. 558 (E.D.N.Y. 1986) 21, 23, 26

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762 F.2d 243 (2d Cir. 1985) 23, 24

Farrar v. Hobby,
506 U.S. 103 (1992) 10

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461 U.S. 424 (1983) ..... passim

Holding Grp., L.L.C.,
287 F.3d 279 (3d Cir. 2002) 22

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491 U.S. 754 (1989) 9

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692 F.2d 875 (2d Cir. 1982) 8

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548 F.3d 463 (6th Cir. 2008) 23

Marek v. Chesny,
473 U.S. 1 (1985) 9

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Andersen v. King County,
138 P.3d 963 (Wash. 2006) 26, 27

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42 U.S.C. § 1983 ..... *passim*

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INTEREST OF AMICI[1]

Amici are civil rights and public interest organizations that enforce civil rights laws both on their own behalf and/or on behalf of their clients, private plaintiffs. *Amici* bring litigation which seeks fees pursuant to 42 U.S.C. § 1988 ("§ 1988"), as well as fee-shifting provisions of other statutes whose jurisprudence tracks § 1988.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of that mission, the ACLU frequently litigates cases that are subject to federal fee-shifting statutes. The proper interpretation of those statutes—and, in particular, the circumstances under which defendants are entitled to recover fees—is therefore a matter of significant concern to the ACLU.

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is twofold: (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Since its

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the undersigned counsel contributed financially to its preparation or submission. The parties have consented to the filing of this brief.

founding in 1947, Americans United has participated as a party, counsel, or amicus curiae in many of the Court's leading church-state cases. The cases brought by Americans United typically deal with unsettled and controversial areas of law, and the results of the cases often are difficult to predict *ex ante*. Americans United rarely seeks damages in its cases, and the plaintiffs in such cases could be deterred from suing at all if they face an increased risk of liability for the defendant's attorneys' fees.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. In its funding role, the Impact Fund reviews requests for grants to cover expenses of civil rights litigation and is frequently called upon to assist firms in finding financing, co-counsel, or other resources necessary to bring significant litigation. It also represents non-profit organizations in their fee litigation. The Impact Fund's experience attests to the fact that the growing expenses of impact litigation have made it much more difficult to attract counsel to public interest cases in many parts of the country.

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the effort to assure civil rights for all Americans. On behalf of its clients, the Lawyers' Committee litigates federal cases involving voting rights, employment discrimination, housing discrimination, education discrimination, and environmental justice. The Lawyers' Committee does not charge its clients a fee and instead depends on the attorneys' fees provisions of § 1988 and other federal

statutory provisions to support its litigation activities. Most, if not all, of the Lawyers' Committee's clients have limited resources and an adverse decision in this action may have a detrimental effect on future civil rights enforcement.

The Legal Aid Society of New York City ("Society") is a private, nonprofit law office dedicated since 1876 to providing legal representation to persons who cannot afford a lawyer. In *Blum v. Stenson*, 465 U.S. 886, 890 n.3 (1984), this Court noted that the Society "enjoys a wide reputation for the devotion of its staff and the quality of its service." In addition to providing direct legal services to individual clients in over 300,000 cases annually, the Society periodically commences 42 U.S.C. § 1983 ("§ 1983) litigation seeking redress for an unlawful governmental policy or systemic practice, often in conjunction with supplemental state law claims, when that is the most efficient means to provide legal assistance. The Society is vitally concerned that the holding of the Fifth Circuit Court of Appeals will, if affirmed, chill victims of an unlawful governmental policy or practice who have limited financial means from seeking judicial redress on federal grounds; will spawn satellite litigation whenever a federal claim is voluntarily dismissed, thus discouraging voluntarily dismissals; and will provide a windfall to defendants who would have litigated over the same core of operative facts regardless of the dismissal of a federal claim.

The National Employment Lawyers Association, New York ("NELA/NY") is the New York chapter of a national bar association dedicated to the vindication of individual employees' rights. In addition to the daily participation of its members in employment cases, NELA/NY has filed numerous amicus briefs in

cases presenting important questions of anti-discrimination law. The aim of this participation has been to cast light not only on the subtleties of the legal issues presented but also on the practical effects of legal decisions on the lives of working people.

The National Fair Housing Alliance ("NFHA") is a consortium of private, non-profit fair housing organizations, state and local civil rights groups, and individuals that was formed in 1988 to lead the fight against housing discrimination in this country. In conjunction with its members, NFHA strives to eliminate housing discrimination and ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. As part of its enforcement activities, NFHA assists its members and participates itself in federal and state court litigation brought under the Fair Housing Act and state and local fair housing laws. The legal issue presented in this appeal is of great importance to NFHA and its members. The Fifth Circuit's decision, if allowed to stand, would undercut private enforcement of state and federal fair housing laws, in contravention of clear legislative intent.

People For the American Way Foundation ("PFAW Foundation") is a nationwide, non-profit, non-partisan citizens' organization established to promote and protect civil and constitutional rights and devoted to our nation's heritage of tolerance, pluralism, and liberty. PFAW Foundation has frequently represented parties, or sued on its own behalf, in cases involving constitutional and statutory civil rights including the Speech, Free Exercise, and Establishment Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amend-

ment, the Equal Access Act, and the Voting Rights Act. The resolution of this case is of extreme interest to PFAW Foundation, its members, and potential future litigants whom they may counsel.

Public Justice is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable. Public Justice specializes in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims' rights, workers' rights, the preservation of the civil justice system, and the protection of the poor and powerless. Public Justice frequently brings civil rights cases—and, in particular, cases under § 1983. For example, they currently represent a prisoner who was terribly beaten by guards and the family of a prisoner who died of penile cancer as a result of officials' deliberate indifference to his serious medical needs. Moreover, throughout its history, Public Justice has participated in numerous cases to highlight the role that attorneys' fees can play in either promoting or hindering plaintiffs' access to justice. Public Justice believes that, in the present case, if the defendants' fee award is upheld, the enforcement of the nation's civil rights laws could be stifled, and access to justice will be denied.

SUMMARY OF ARGUMENT

Civil rights litigation is at equipoise under this Court's precedent. While plaintiffs, regardless of their means, are empowered to vindicate meritorious civil rights claims under the fee-shifting provision of § 1988, the law also discourages plaintiffs from pursuing weak or frivolous claims by denying compensation for unsuccessful lawsuits and subjecting plain-

tiffs and their counsel to Rule 11 or other sanctions. This regime is largely successful at winnowing out cases and claims that should never be brought while also serving Congress's intent of supporting the prosecution of righteous civil rights claims. Pursuant to this framework, *amici* are able to pursue the crucial work of vindicating plaintiffs' civil rights and advocating novel arguments essential for the evolution of Constitutional jurisprudence.

The Fifth Circuit's decision threatens to disrupt this careful balance by expanding the circumstances wherein defendants will be awarded fees under § 1988. The lower court erroneously affirmed an award of all of defendants' attorneys' fees based on one allegedly frivolous claim, even where Mr. Fox has clearly meritorious state-law claims still pending against defendants, which arose from the same underlying misconduct. Even assuming for purposes of this brief that the federal claim was frivolous, *but see* Pet'r Br. at 39-41, an award that grants fees to a civil rights defendant in these circumstances is manifestly overbroad.

Instead, this Court should adopt the rule proposed by Petitioner and hold that defendants cannot recover attorneys' fees under § 1988 where a plaintiff's "frivolous" claim is factually intertwined with non-frivolous claims. Under this approach, defendants could only recover attorneys' fees where they can demonstrate that the entire lawsuit was frivolous or that the frivolous and non-frivolous claims were factually distinct. *Amici* reach this result recognizing that an award of attorneys' fees to defendants, while appropriate in the face of wholly frivolous litigation (and, indeed, required under § 1988),

should not be expanded beyond this Court's precedents.

The broader approach presented by the Fifth Circuit's opinion should be reversed for the following reasons:

- The Fifth Circuit's approach errs in ignoring the interrelatedness between the meritorious claims and the claim deemed frivolous here. *See* Section I, *infra*.
- The Fifth Circuit's approach excessively penalizes civil rights plaintiffs given the existing regime, which sufficiently discourages frivolous lawsuits. *See* Section II, *infra*.
- Excessive fees to civil rights defendants are unjustified in the absence of market failure; government actors need no incentive to *defend* against civil rights actions. *See* Section III, *infra*.
- The Fifth Circuit's rule, by making plaintiffs vulnerable to excessive fees, would have a profound chilling effect on legitimate civil rights claims. *See* Section IV, *infra*.
- This chilling effect is heightened because determinations that claims are frivolous are often unpredictable. *See* Section V, *infra*.
- The Fifth Circuit's rule would have the effect of increasing litigation. Plaintiffs will be reluctant to abandon weak claims, fearing liability for defendants' fees. Additionally, fee litigation will multiply, as defendants will frequently seek fees when a plaintiff fails to prevail on each claim. *See* Section VI, *infra*.

ARGUMENT

I. Congress Seeks to Empower Civil Rights Plaintiffs While Deterring Frivolous Lawsuits

In enacting § 1988, Congress expressed its clear desire to empower civil rights plaintiffs to bring lawsuits which vindicate their federal rights. Section 1988 recognizes a marketplace imbalance from the fact that many civil rights plaintiffs do not have the resources to retain counsel and typical alternative fee structures (such as the classic contingency fee) are often unviable. Unlike medical malpractice cases for example, many civil rights cases do not yield the large damage awards that would motivate a private attorney to take a case on a contingency basis. *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986); *see also Blanchard v. Bergeron*, 489 U.S. 87, 90, 96 (1989) (holding that "a § 1988 fee award should not be limited by a contingent-fee agreement between the attorney and his client;" "Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages."); *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel."). Accordingly, § 1988 and the cases interpreting it generally award attorneys' fees to prevailing plaintiffs to encourage them to sue as "private attorneys general," recognizing that where the plaintiff pre-

vails, the fees are paid by a governmental actor who violated the federal constitution or a federal statute. *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989) ("Our cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes").

In marked contrast, and consistent with the American rule, defendants are only awarded their attorneys' fees under § 1988 (which we will call "reverse fee shifting" in this brief) in the rare case where "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983). The purpose of this asymmetrical approach is to ensure that the incentives are as Congress intended them to be: to encourage plaintiffs to seek vindication while still ensuring that defendants are protected from the "vexatious" plaintiff who brings a civil rights lawsuit solely in order to "harass or embarrass the defendant." *Id.*

Nonetheless, there are also significant limitations to a prevailing plaintiff's attorneys' fee award. To give just some examples of the significant body of jurisprudence that has developed in this area: If a civil rights plaintiff declines a Rule 68 Offer of Judgment from defendants, the plaintiff cannot recover for subsequent attorneys' fees if his or her ultimate recovery at trial is less than the defendants' Offer—even if the plaintiff obtains a substantial jury verdict. *Marek v. Chesny*, 473 U.S. 1, 9 (1985). Additionally, plaintiffs are awarded no attorneys fees where plaintiffs' lawsuit "achieved the desired result" and "brought about a voluntary change in the defendant's conduct," but plaintiffs have "failed to secure a judgment on the

merits or a court-ordered consent decree." *Buckhannon Bd. and Care Home, Inc. v. W.V. Dep't Dept. of Health and Human Res.*, 532 U.S. 598, 600 (2001). Moreover, a court may reduce the fee award to a prevailing plaintiff where it determines that "a plaintiff has achieved only partial or limited success." *Hensley*, 461 U.S. at 433-35. And, more specifically, even where a jury holds that the defendants violated plaintiff's constitutional rights, if the jury awards only nominal damages "the only reasonable fee is usually no fee at all." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). Accordingly, these other hurdles under the current regime restrict plaintiffs' recovery of fees and protect against undue awards to plaintiffs.

The Fifth Circuit's approach threatens to disrupt this balance. Here, the Fifth Circuit awarded defendants their attorneys' fees even though the litigation, in the main, was indisputably not frivolous, because the Court found that one claim—which arose from the same underlying misconduct—was frivolous. This was error.[2] To be clear, *amici* do not condone

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[2] *Amici* do not agree that petitioner's federal allegation was frivolous. *See* Pet's Br. at 39-41. However, accepting this premise as true *arguendo*, the Fifth Circuit erred by requiring Mr. Fox to pay Mr. Vice's attorneys' fees, though the federal and state law claims were factually interrelated, and the court compounded this error by ordering Mr. Fox to pay *all* of defendants' fees, even those incurred for depositions and other discovery that were directly useful for the state law claims. (While the Fifth Circuit stated that defendants can only recover for "attorneys' fees for work which can be distinctly traced to a plaintiff's frivolous claims," Petition Appendix 11a, the Circuit made that language meaningless by upholding the magistrate judge's decision awarding *all* fees without any meaningful review of that fee award.) *Amici* urge this Court to hold that no fees should

(*Footnote continued*)

the filing of frivolous claims, but, as detailed *infra* Section II, there are other powerful disincentives against such filings. The bigger risk, in *amici*'s view, is that meritorious civil rights claims will be deterred.

The Fifth Circuit's rule misunderstands Congress's intent, which focused on deterring frivolous litigation that can be an unfair burden to an innocent defendant. *See Hensley*, 461 U.S. at 429 n.2 (providing for reverse fee shifting where "the *suit* was vexatious, frivolous, or brought to harass or embarrass the defendant" (emphasis added)). As this Court noted in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978), during "Senate floor discussions of the almost identical attorney's fee provision of Title II . . . several Senators explained that its allowance of awards to defendants would serve 'to deter the bringing of *lawsuits* without foundation,' 'to discourage frivolous *suits*,' and 'to diminish the likelihood of unjustified *suits* being brought.'" (Internal citations omitted, emphasis added). Congress's intent was "to protect defendants *from burdensome litigation* having no legal or factual basis." *Id.* (emphasis added).

This might counsel towards a rule where fees should only be awarded to defendants where the entire litigation is frivolous. *Amici* recognize, however,

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have been awarded to Mr. Vice because the supposedly frivolous claim was intertwined with the non-frivolous claim, and this brief focuses on that argument. However, even if the Court were to hold that the district court could properly award Mr. Vice some fees, we urge the Court to reverse the fee award, and limit fees to those directly and exclusively spent defending against a frivolous federal claim.

that such a rule would place form over substance because the liberal joinder rules of the Federal Rules of Civil Procedure permit plaintiffs to combine claims arising from wholly unrelated events into one litigation. *See* Fed. R. Civ. P. 18(a) ("A party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party."). In such a situation, as this Court has recognized, where a plaintiff alleges *unrelated* claims in a single lawsuit, such "unrelated claims [should] be treated as if they had been raised in separate lawsuits," for purposes of fee shifting. *Hensley*, 461 U.S. at 435.

But this same rationale is why *interrelated* claims—i.e. claims arising from the same factual underpinnings—should be treated differently for reverse fee shifting purpose. Such claims are not "separate lawsuits," *id.*, but merely varying legal theories seeking recovery for the same, or similar, underlying misconduct. To grant defendants their attorneys' fees in circumstances where one legal claim is deemed frivolous but is factually intertwined with meritorious claims (as here) would lead to a cascade of prejudice to civil rights plaintiffs that is out of step with Congressional intent. As discussed below, funding defense costs in this situation is antithetical to the purpose of § 1988. *See infra* Sections II-V.

Amici accordingly urge the Court to adopt Petitioner's approach and hold that defendants cannot recover attorneys' fees under § 1988 where a plaintiff's "frivolous" claim is factually intertwined with non frivolous claims. Defendants should only be able to recover attorneys' fees where they can demonstrate that the entire lawsuit was frivolous or that the frivolous and non-frivolous claims were factually

distinct, such that the claims were, in reality, "separate lawsuits." *Hensley*, 461 U.S. at 435.

This approach avoids the anomalous situation that the Fifth Circuit's precedent could create, in which a plaintiff largely succeeds in his or her litigation, is awarded damages or injunctive relief along with attorneys' fees as the prevailing party, and is nonetheless ordered to pay defendants' attorneys' fees because a single claim is deemed frivolous (due perhaps to the distorting effects of hindsight, as detailed *infra* Section V). Such a result would be both unfair and inconsistent with Congress's desire to facilitate plaintiffs' pursuit of meritorious civil rights claims.

II. This Court's Jurisprudence, the Federal Rules, and the Reality of Civil Rights Lawyering Already Provide Defendants Appropriate Protection From Frivolous Lawsuits

Frivolous claims are anathema to civil rights litigation which seeks to vindicate the most important values of the Republic. Appropriate checks and balances are necessary to prevent the fee-shifting framework of § 1988 from abuse by vexatious plaintiffs. These disincentives are an important counterweight to fee-shifting. But this regime is a delicate one. The Fifth Circuit's precedent disrupts this balance by radically increasing the potential costs to civil rights plaintiffs despite ample disincentives for frivolous litigation. Plaintiffs and their counsel already consider these risks, which dissuade the filing of weak claims and sufficiently accomplish Congress's goal of "protect[ing] defendants from burden-

some litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420.

At the outset, the realities of the practice of law serve as a practical bar against the filing of weak or frivolous claims. Fee-shifting statutes, of course, only provide for recovery of attorneys' fees if a plaintiff is successful. Plaintiffs' counsel and civil rights organizations are thus financially motivated to screen their cases to ensure that only those with a high likelihood of success are brought. This is not to say that counsel never err, but the current regime effectively winnows weak or frivolous claims.

Moreover, plaintiffs bringing non-frivolous cases are of course not assured of victory. For example, there may be an intervening change to the controlling law, discovery may not provide the proof needed, or the jury may find that the plaintiff has not met his or her burden of proof. *See Christiansburg*, 434 U.S. at 422 ("No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation"). Plaintiffs are then liable for their own costs and potentially liable for the defendants' costs. Fed. R. Civ. P. 54(d)(1). Moreover, civil rights organizations like *amici* must expend the cost in attorney time for bringing the claim, and such time is not compensable if the organization (or its client) does not ultimately prevail.

Additionally, there is no question that under this Court's established precedent, a prevailing defendant may be awarded its attorneys' fees where the entire

lawsuit (*i.e.*, *all* of the claims asserted) is found to be frivolous. *See Hensley*, 461 U.S. at 429 n.2; *Christiansburg*, 434 U.S. at 421.

Most importantly for this case, Rule 11 deters plaintiffs from bringing frivolous claims, even where there are non-frivolous claims brought at the same time. Rule 11 is more suited to the task of appropriately deterring the filing of frivolous claims than is § 1988 in at least two ways.

First, Rule 11 contains a "safe harbor" provision: opposing counsel cannot seek sanctions "if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service" of the sanctions motion. Fed. R. Civ. P. 11(c)(2). Rule 11 thus gives the plaintiff an opportunity to evaluate—with considerably more information than he or she would have at the pleading stage—the potential financial risk of going forward. Moreover, in counseling clients about the potential risks of bringing a civil rights lawsuit, the right to such notice is a significant protection against unpredictable reverse fee shifting.

Second, Rule 11 permits courts to sanction counsel, represented parties, or both, depending on the source of the frivolous filing. *Bus. Guides, Inc. v. Chromatic Comme'ns Enters., Inc.*, 498 U.S. 533, 545-46 (1991) (explaining that represented parties are accountable for sanctionable activity after the 1983 amendments to Rule 11). In marked contrast, under § 1988, it is *the client*, the civil rights plaintiff, who is responsible for *all* the defendants' attorneys' fees if the court orders reverse fee shifting. The attorney owes nothing. (In *amici*'s view, the better

practice would be for the court to direct sanctions to the appropriate payer, on a case-by-case basis.)

This disparity is particularly striking in the context of this case. Mr. Fox's factual allegations were completely meritorious, as a criminal jury found and as civil discovery demonstrated. Mr. Vice used his power as a police officer to learn negative information about Mr. Fox. Mr. Vice sent Mr. Fox an extortive letter containing that information in order to induce him to drop out of the election. Mr. Vice then caused a drug dealer to file a false criminal complaint against Mr. Fox; and Mr. Vice then tried to disseminate these false allegations in the media. There was nothing *factually* frivolous about Mr. Fox's claims.

Instead, the Fifth Circuit found (erroneously, but a conclusion we accept *arguendo* for purposes of this brief) that the claims were *legally* frivolous. This is a vital distinction. Experience suggests that counsel learn of the underlying facts from their clients. And it is then *counsel* who determines whether those facts state a § 1983 claim or merely state-law claims. A lay client, who generally has no legal training, would be wholly unequipped to determine whether his complaint stated a valid cause of action under § 1983.[3]

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[3] This situation is in marked contrast, for example, with *Business Guides*, 498 U.S. 533, where this Court affirmed a Rule 11 sanction (pursuant to the pre-1993 version of Rule 11) against a represented plaintiff who had alleged—based on information in its business records—that the defendant had false information in a directory it produced, though a reasonable inquiry would have indicated that defendant's directory was accurate, save for the false information plaintiff had purposefully

(*Footnote continued*)

The drafters of Rule 11 *explicitly* recognized the distinction between legal frivolousness and factual frivolousness. Both are clearly sanctionable under Rule 11, but in different ways. Rule 11(b)(2) prohibits legally frivolous claims, stating that the signer of a court filing must certify that

> the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law[.]

Yet, Rule 11 prohibits courts from punishing a represented party when his or her counsel files "claims" which are not "warranted by existing law or by a nonfrivolous argument for extending" that law. Specifically, Rule 11(c)(5) states that the "court *must* not impose a monetary sanction . . . against a represented party for violating Rule 11(b)(2)." The Advisory Committee explained that "[m]onetary responsibility for such violations is more properly placed solely on the party's attorneys." Fed. R. Civ. P. 11, advisory committee's note.

Of course, § 1988's requirement that clients, and not counsel, are the ones held liable for any reverse fee shifting applies regardless of whether the frivolous claim is factually intertwined with non-frivolous claims. Yet the problem is particularly apparent where frivolous and non-frivolous claims are inter-

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planted. As *Business Guides* recognized: "Quite often it is the client, not the attorney, who is better positioned to *investigate the facts* supporting a paper or pleading." *Id.* at 549 (emphasis added). In contrast, it is counsel who is "better positioned," *id.*, to determine whether those facts amount to a federal claim.

twined. In such situations, it is more likely that the attorney is the blameworthy party because it was counsel who chose to bring frivolous legal claims, even though the client's underlying allegations made a non-frivolous case. At a minimum, this unfairness should caution the Court against *extending* the reverse fee shifting provision of § 1988 to hold clients financially liable for their attorneys' errors of judgment.

III. The Harsh Fifth Circuit Rule Is Not Necessary to Remedy a Market Imbalance

Congress passed § 1988 to remedy a market imbalance—the market "failed to provide many victims of civil rights violations with effective access to the [courts]." *City of Riverside*, 477 U.S. at 576 (citing H.R. Rep. No. 94-1558, at 3 (1976)). First, "victims [of civil rights violations] ordinarily cannot afford to purchase legal services at the rates set by the private market." *Id.* (citing H.R. Rep. No. 94-1558, at 1 (1976) and S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912). In addition, "the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *Id.* at 577.

Congress had no similar concern in providing for the reverse fee shifting component of § 1988. There is no need to encourage government actors to *defend* themselves against civil rights actions. Municipalities themselves are repeat players in civil rights lawsuits and, accordingly, obtain insurance, or choose to

self-insure, to cover defense costs of such suits. Moreover, municipal officials and actors who are sued based on alleged civil rights violations are virtually always defended and indemnified.[4]

Indeed, the only financial imbalance here is the windfall sought by defendants and their counsel in this case. Defendants now stand to receive *all their attorneys' fees* (over $50,000), though they relied on the claim they now argue is frivolous to remove the action to federal court and never sought to dismiss it until after expending attorney costs during discovery.

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[4] *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 U.C.L.A. L. Rev. 1023, 1038 (2010) ("Given the prevalence of indemnification, a damages award is highly unlikely to be paid out of the officer's pocket."); Lant B. Davis, John H. Small & David J. Wohlberg, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 812–14 (1979) (asserting that municipalities indemnify officers for any settlement or judgment); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 686 (1987) (noting that a study of Section 1983 cases in one federal district found no case in which an officer was not indemnified); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 Fordham Urb. L. J. 587, 596–600 (2000) (describing indemnification practices in New York City); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum. L. Rev. 247, 284 (1988) ("[I]ndividual defendants virtually never pay damages to plaintiffs."); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J. Const. L. 797, 812 (2007) ("Public employers are usually required by statute to indemnify their employees or otherwise pay judgments against those employees arising from torts committed within the scope of their employment.").

In evaluating the effects of extending reverse fee shifting, then, this Court should consider that there is no need for the financial incentive that would be created by the overbroad rule crafted by the Fifth Circuit. (Nor is there a need for the deterrent effect of such a harsh rule to prevent frivolous claims, given Rule 11 and other existing disincentives, as detailed above).

IV. The Fifth Circuit's Rule Threatens to Chill Civil Rights Plaintiffs from Vindicating Federal Claims

The Fifth Circuit's rule also threatens to chill the assertion of meritorious civil rights claims.

Under the Fifth Circuit's approach, private plaintiffs and civil rights organizations would be forced to confront the risk of being responsible for defendants' legal fees if a court were to find that *any one* of several claims were frivolous, even if that claim were factually intertwined with other, meritorious claims. In this case, the amount of reverse fee shifting was more than $50,000—a potentially bankrupting amount to a middle-class family. In other cases, where attorneys' rates are higher than they are in Louisiana or where there was more substantial discovery, such reverse fee shifting could easily run into the hundreds of thousands or even millions of dollars—an amount that could bankrupt even large civil rights organizations. Worse yet, the scale of the risk created by reverse fee shifting is unknown, hard to estimate at the time of filing, and largely outside a plaintiff's control. Where the potential gravity of the harm is so debilitating, the fact that the risk of an erroneous frivolousness finding is low is of little com-

fort to a prudent plaintiff doing an appropriate cost-benefit analysis.

Courts and Congress have recognized the substantial risk that reverse fee shifting awards would chill civil rights plaintiffs, thus frustrating Congress's purpose. The Seventh Circuit, for example, has explained that, "[i]f prevailing defendants were *routinely* awarded attorney's fees under § 1988, civil rights plaintiffs would be extremely reluctant to initiate litigation for fear of being charged with a fee award vastly exceeding the expected recovery, and in some cases their ability to pay, thereby vitiating the underlying purpose of § 1988." *Coates v. Bechtel*, 811 F.2d 1045, 1049 (7th Cir. 1987) (emphasis added) (citing S. Rep. No. 94-1011 at 5, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 ("civil rights plaintiffs should not be deterred 'from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose'")); *see also Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 574 (E.D.N.Y. 1986) (stating, in context of Rule 11, that fee shifting "will discourage attorneys from pursuing novel yet meritorious legal theories").

Such potentially debilitating liability, especially when imposed through the blunt instrument of a fee-shifting statute rather than the more flexible and calibrated Rule 11 regime, creates its own *in terrorem* effect, particularly when coupled with the pre-existing costs of pursuing a civil rights claim. It is not easy to be a civil rights plaintiff in any event: bringing a lawsuit means, among other things, opening one's life to the broad-ranging discovery permissible under the federal rules, continually responding to counsel's inquiries for documents, being interro-

gated during a deposition, and missing work for a potentially weeks-long trial. While these costs are common to all plaintiffs, those in non-civil-rights cases can be incentivized by the prospect of large damages awards if they succeed. That is often not true for civil rights claimants. As Congress recognized, the very reason that fee-shifting statutes are necessary is that the monetary damages resulting from civil rights violations are often low—too low for private attorneys to be willing to take these cases without fee shifting and too low to create an economic incentive to sue. *See City of Riverside*, 477 U.S. at 576-78 (citing H.R. Rep. No. 94-1558, at 2 (1976)). Indeed, many civil rights lawsuits seek only injunctive relief. Adding the potentially ruinous costs of paying the defendants' attorneys' fees—even where the plaintiff is ultimately victorious on factually-intertwined claims—threatens to dissuade many prudent civil rights plaintiffs.

Additionally, the Fifth Circuit's rule has the potential to deter creativity in theorizing new legal arguments, which has been described as "the very lifeblood of the law." *LaSalle Nat'l Bank v. First Conn. Holding Grp., LLC*, 287 F.3d 279, 289 (3d Cir. 2002). Faced with the prospect of reverse fee-shifting of the sort approved by the Fifth Circuit in this case, civil rights plaintiffs may well choose to pursue only well-established claims and abandon more innovative claims that a skeptical court, late in the case, might deem frivolous. If so, necessary changes in the law may be delayed and valid claims may be foregone. "Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the

common law itself." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). Indeed, Judge Weinstein has noted that the "first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education*." *Eastway Constr. Corp.*, 637 F. Supp. at 575 (noting further that "the apparently useless challenges by attorneys of the still relatively recent Supreme Court decision in *Swain v. Alabama* have induced the Court quickly to reconsider and reject that ill-conceived ruling"). The Fifth Circuit's approach would dissuade plaintiffs from "challeng[ing] the received wisdom," *Eastway Constr. Corp.*, 762 F.2d at 254, even if counsel believed they had a good faith basis for modifying existing law.[5] The loss of such creativity due to a fear of expansive reverse fee shifting would not only frustrate Congressional intent, it would cause stagnation in the common law.

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[5] For example, one *amicus*, the Lawyers' Committee for Civil Rights Under Law, Washington, D.C., recently brought a constitutional challenge to Ohio's voting system. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008). While the voting system was clearly defective, there was scant caselaw establishing whether that violated the constitution, and, if so, which constitutional rights were violated by such defects. The Lawyers' Committee and its co-counsel theorized innovative and meritorious legal arguments; the District Court, recognizing the novelty of these claims, certified for interlocutory appeal its denial of the motion to dismiss. *Id.* at 471-72. After the Sixth Circuit affirmed the denial of the motion to dismiss as to two of the claims, the case settled and the State of Ohio agreed to transform its voting procedures. Such creative lawyering risks being chilled if the Fifth Circuit's rule is affirmed.

This is not to say that some civil rights cases are not, indeed, frivolous and brought solely in order to harass a defendant. Some cases undoubtedly are. But ample mechanisms already exist to deter such lawsuits. *See supra* Section II. And the Fifth Circuit's rule goes far beyond the mere punishment of those who bring wholly frivolous cases. Indeed, under the Fifth Circuit's rule, a plaintiff could win a lawsuit, obtain significant damages or injunctive relief, yet still face a reverse fee shifting award because one of its claims—even a claim factually intertwined with the winning claims—were deemed frivolous. This case demonstrates that point (even assuming Mr. Fox's federal claim was frivolous, which is disputable): given Mr. Vice's criminal conviction, Mr. Fox may well succeed on his lawsuit (currently pending in state court) and defendants may well be held liable for their tortious conduct against Mr. Fox. Yet if this Court affirms the lower court, the defendants would be compensated for *that same misconduct*, in the form of payment for their attorneys' fees.

Accordingly, should the decision below be affirmed, responsible counsel would be required, at the start of each litigation, to advise their clients about the risks they face in pursuing their civil rights claims, even where the litigation is indisputably not brought for purposes of harassment. Counsel would undoubtedly advise their clients that, in counsel's view, none of the claims were frivolous (responsible counsel would never bring claims that they believed were frivolous). But responsible counsel would also be forced to admit that more novel claims, or claims where the entire factual basis cannot be known at the outset, create significant risk for the plaintiff. Findings of frivolousness are not entirely predictable

(as detailed further, *infra* Section V). Clients would then be in the awkward position of having to determine whether to trust their counsel's analysis, knowing their attorney's error could lead to financial ruin.

V. The Fifth Circuit's Rule Is Particularly Chilling Because Frivolousness Determinations Are Often Unpredictable and Influenced by the Hindsight Effect, as Demonstrated by this Case

The *in terrorem* effect of the Fifth Circuit's rule is particularly strong because frivolousness determinations are difficult to predict and are frequently influenced by hindsight.

It can often be quite difficult to distinguish, *ex ante*, between colorable claims that nevertheless present an uphill battle (for which success may depend on favorable discovery, an attentive and sympathetic jury, and other factors), from those that a court could deem frivolous. As commentators have observed, "claims which appear frivolous and baseless in the eyes of one judge may seem respectable losers to others," and "courts have had a fair amount of trouble developing standards for distinguishing frivolous cases from ordinary losers." Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A L. Rev. 65, 66, 94 (1996) (hereinafter "Yablon, *Essay on Probability*"); *see also* Jessica Butler-Arkow, *The Individuals with Disabilities Education Improvement Act of 2004: Shifting School Districts' Attorneys Fees to Parents of Children with Disabilities and Counsel*, 42 Willamette L. Rev. 527, 537-542 (2006) ("The definition of frivolous may be in the eye of the beholder—another reason for caution in shifting fees."); *East-*

way Constr. Corp., 637 F. Supp. at 574 ("Court opinions on attorneys' fees speak easily of cases being either frivolous or nonfrivolous . . . [but r]eality is more complicated. In the legal world, claims span the entire continuum from overwhelmingly strong to outrageously weak.").

Indeed, one study by the Federal Judicial Center found that 19 percent of Rule 11 reversals by the Courts of Appeals were based on the appellate court's finding that the cases were meritorious, though the lower court had found otherwise. Clearly, even judges do not always agree about which cases cross the line into frivolousness. Yablon, *Essay on Probability*, 44 U.C.L.A. L. Rev. at 94 (citing Federal Judicial Ctr., Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States 21 (1991)). Another study showed that, when presented with the same hypothetical scenario, judges were not far from evenly split on whether to award sanctions: "60.3% of the judges would have awarded sanctions and the others would not." *Id.* (citing Saul M. Kassin, *An Empirical Study of Rule 11 Sanctions* 17 (1985)).

Even judges hearing the same case at the same time may differ wildly, with a claim that some find meritorious being dismissible as frivolous by others. In a recent civil rights case in Washington state court, two concurring justices found that the argument that same-sex couples have a constitutional right to marry was "so *frivolous* as to merit dismissal without further argument." *Andersen v. King County*, 138 P.3d 963, 999 (Wash. 2006) (Alexander, C.J., concurring) (emphasis added). In marked contrast, four dissenting justices concluded that the same claim not only was not frivolous, but was meri-

torious. *Id.* at 1013 (Fairhust, J., dissenting, concurred with by Bridge, J., Owens, J. and Chambers, J.).

Whether a claim is frivolous must be analyzed from the perspective of what was known or knowable at the time a suit was brought. Fed. R. Civ. P. 11, advisory committee's note (courts should "avoid using the wisdom of hindsight"). Yet courts generally resolve sanctions motions *after* a claim has been dismissed—either by the Court or voluntarily by the party—indeed, counsel often tactically decide to seek sanctions only at that late stage. At that point, it is very difficult for the benefits of hindsight not to cloud the court's judgment.[6] *See Christiansburg*, 434 U.S. at 421-22 (decrying the "understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success."). Simply put, despite the urgings of this Court in *Christiansburg*, "a judge is more likely to find a violation of Rule 11 (which is, after all, a finding that a case or

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[6] As psychologists have explained, "hindsight bias" is an established "tendency for people to overestimate the predictability of past events." Chris Guthrie, et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 799 (2001). A study of 167 federal magistrate judges has shown, not surprisingly, that judges are susceptible to this type of bias, including in the decision on whether a claim is sanctionable. *Id.* at 800 (stating that "the hindsight bias likely influences . . . the levying of sanctions under Rule 11 of the Federal Rules of Civil Procedure [because] a motion or allegation seems less meritorious after a court rejects it").

claim had a very low probability of success[7] when that judge already knows that the claim has been dismissed on the merits." Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11 Litigation*, 37 Loy. L.A. L. Rev. 599, 605 (2004).

The defendants' behavior in this case both invited such hindsight bias and magnified its costs. At the time Mr. Fox filed his complaint, *not one* of the defendants thought it was so legally deficient that a motion to dismiss was warranted. Instead, the defendants removed the case to federal court and decided to pay their attorneys for the costs of discovery, including numerous depositions, accruing substantial fees in the process. Had they sought dismissal of plaintiff's federal claim after the Complaint was initially filed—at the time when any frivolousness should have been obvious, if the claim were indeed frivolous—Mr. Fox would be liable for a fraction of the total attorneys' fee award he now faces. And, as detailed in Petitioner's brief, there is a significant argument that plaintiff's federal claim was not legally frivolous. *See* Pet'r Br. at 39-41.

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[7] The consequences of this hindsight effect are likely to be even more severe in the context of reverse fee-shifting under § 1988 than in the Rule 11 context. In the Rule 11 context, "the court may impose an appropriate sanction," which "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c). This sanction can include a penalty paid to the court, nonmonetary actions, or "part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." *Id.* In marked contrast, § 1988 provides for an award of a "reasonable attorney's fee," and there is "a "strong presumption" that the lodestar represents the "reasonable" fee. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

These realities – that frivolousness determinations are unpredictable and made with the benefit of hindsight, that the defendants' failure to file a motion to dismiss does not preclude them from later arguing that a claim was frivolous from inception, that the extent of the defendants' fees is unknowable at the time of filing, and that even ultimately winning a case does not preclude a determination of liability for reverse fee shifting where a plaintiff asserts a single claim that is found to be frivolous even when factually intertwined with winning claims—open a civil rights plaintiff to ruinous attorneys' fees under the Fifth Circuit's rule, regardless of whether the plaintiff's litigation is fundamentally meritorious.

VI. The Practical Effect of the Fifth Circuit's Rule Will Be to Increase Litigation Over Both Borderline Claims and Attorneys' Fees

As detailed above, the Fifth Circuit's rule, if affirmed, would chill civil rights plaintiffs and impose an unfair penalty on clients who are unable to evaluate the merit of various potential legal claims. Yet that is not the decision's only infirmity. From the perspective of the federal courts, the most obvious result of this rule would be a multiplication of unnecessary litigation in two ways: plaintiffs may be more reluctant to abandon weak claims, and defendants will be more likely to seek fees whenever a weak claim is abandoned.

Under the current regime, prudent plaintiff's counsel plead all viable, non-frivolous claims at the outset. Such an approach ensures that a plaintiff's complaint maximizes the chance of recovery given that discovery often proceeds in unexpected ways:

indeed, at times intervening changes in the law can weaken strong claims and *vice versa*. The corollary to this approach, however, is that as discovery proceeds, prudent counsel should voluntarily dismiss claims at various points before trial.

In practice, plaintiffs can and do abandon claims through the course of litigation. At the summary judgment stage, for example, a plaintiff often recognizes that the allegations it hoped to prove simply were not borne out through discovery. Moreover, it is often very useful, as a matter of trial strategy, to voluntarily dismiss even winnable claims (or defendants) to present a more streamlined theory of the case to the jury. This is particularly true where such claims provide no additional relief as compared to claims that present a higher likelihood of success.

An efficient judicial system should *encourage* parties to use the process of discovery to winnow their claims, where appropriate. Such winnowing ensures that courts, opposing counsel, and jurors need only focus on the most important claims.

But under the Fifth Circuit's approach, plaintiffs may be reluctant to engage in this efficient winnowing process because voluntary dismissal of claims could be viewed as a concession that the claim was frivolous. Accordingly, opposing counsel, the court, and ultimately the jury will have to expend scarce resources considering the merits of claims that might otherwise have been voluntarily dismissed.

In this case, Mr. Fox's voluntary dismissal was viewed as such a concession. Had Mr. Fox pursued his § 1983 claim, and opposed summary judgment on the grounds detailed in Petitioner's brief at 39-41, the outcome might have been far different. Had the

magistrate judge struggled with the existing authority and written an opinion resolving it—even if that resolution was ultimately in defendants' favor—the magistrate might have been significantly less likely to find that Mr. Fox's case was "vexatious, frivolous, or otherwise without merit." P.A. 27a. Indeed, the hindsight effect discussed above suggests that where courts learn counsel has abandoned claims, they more readily believe such claims should have never been brought in the first place.

Commentators repeatedly criticized the pre-1993 version of Rule 11 precisely because that incentive structure—which is similar to the incentives created by the Fifth Circuit's approach—led to an increase in litigation. Prior to the 1993 amendments, Rule 11 had no safe harbor provision permitting counsel to withdraw challenged filings. Accordingly, "parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11." Fed. R. Civ. P. 11 advisory committee's note to 1993 amendments; *see also* Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure 3 (May 1, 1992), *reprinted in* 146 F.R.D. 519, 523 (1993) (noting that the 1983 version of Rule 11 "provide[d] little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable"); Edward D. Cavanagh, *Rule 11 of the Federal Rules of Civil Procedure: The Case Against Turning Back the Clock*, 162 F.R.D. 383, 395 (1995) (observing that under the 1983 version "the very act of voluntary dismissal [could] be used as evidence that the claim was baseless"); *Lawyers' Responsibilities To The Courts: The*

1993 Amendments To Federal Rule Of Civil Procedure 11, 107 Harv. L. Rev. 1629, 1640 (1994) (noting reluctance to correct claims under the 1983 version because such correction could be viewed as an admission of liability).

Similarly, an affirmance of the Fifth Circuit would increase the amount of satellite litigation over fees. Under the Fifth Circuit's approach, defendants would be encouraged to seek fees *whenever* a plaintiff abandons a claim, because such abandonment alone could constitute evidence of frivolousness, as detailed above. (And even if a defendant loses such a motion, and that ruling is affirmed on appeal, a plaintiff would be significantly chilled in the interim, knowing that he or she was one court ruling away from potentially substantial fee liability). In marked contrast, under the rule advocated by Petitioner—and supported by *amici*—the law would be clear: defendants could not seek fees under a fee-shifting statute based on allegedly frivolous legal claims if such claims are factually intertwined with non-frivolous claims. Accordingly, defendants could only seek fees for allegedly frivolous legal claims if the entire lawsuit was frivolous, or if the frivolous and non-frivolous claims were factually distinct.

Neither increasing plaintiffs' reticence to abandon claims due to a fear of a § 1988 motion nor an onslaught of motions for fees by defendants can be reconciled with the overriding purpose of § 1988, which was to encourage rather than discourage the litigation of civil rights claims.

CONCLUSION

For the foregoing reasons, this Court should hold that a defendant may only recover attorneys' fees

under § 1988 if the plaintiff's entire lawsuit was frivolous or if the plaintiff presents a frivolous claim which is factually distinct from the non-frivolous claims in the lawsuit. Accordingly, the decision below should be reversed and the fee award should be vacated.

Respectfully submitted,

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December 29, 2010

AMICUS CURIAE BRIEF

No. 10-114

In The Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton; TROY CARY, Policeman for the Town of Vinton; TOWN OF VINTON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* ARKANSAS, ALABAMA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, LOUISIANA, MAINE, MISSISSIPPI, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA, WASHINGTON AND WYOMING IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Can defendants be awarded attorney's fees under 42 U.S.C. § 1988(b) in an action based on a dismissal of frivolous claims, where the plaintiff has asserted other interrelated claims?

2. Is it improper to award defendants all of the attorney's fees they incurred in an action under 42 U.S.C. § 1988(b), where the fees were spent defending state-law claims that were intertwined with the frivolous federal claims?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amici Curiae* 1

Summary of the Argument 1

Argument 3

I. Frivolous federal civil rights claims work a significant hardship upon the States, which provide publicly-funded legal representation for the state officials, boards, agencies, and commissions often targeted by such suits 3

II. The attorney's fee provision of § 1988 is among several tools lawmakers have created to help discourage frivolous litigation 6

III. 42 U.S.C. § 1988 mandates that trial courts be given the discretion to equitably determine appropriate fee awards 8

IV. Petitioner's proposed rule is inequitable, unnecessary, and violates § 1988 by stripping the trial courts of discretion 10

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES

Ahmed v. Dragovich, 297 F.3d 201 (3d Cir. 2002) 7

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) 4

Colucci v. New York Times Co., 533 F. Supp. 1011 (S.D.N.Y. 1982) 5

Donnelly v. Rhode Island Bd. of Governors for Higher Educ., 946 F. Supp. 147 (D.R.I. 1996) 4

Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911 (11th Cir. 1982) 5

E.E.O.C. v. Kimbrough Investment Co., 703 F.2d 98 (5th Cir. 1983) 4

E.E.O.C. v. L.B. Foster Co., 123 F.3d 746 (3d Cir. 1997) 5

E.E.O.C. v. Northwest Structural Components, 897 F. Supp. 249 (M.D.N.C. 1995) 4

Harbulak v. County of Suffolk, 654 F.2d 194 (2nd Cir. 1981) 8

Harris v. Maricopa County Superior Court, No. 09-15833, 2011 WL 167040 (9th Cir., Jan. 20, 2011) 13

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Hughes v. Rowe, 449 U.S. 5 (1980) 4

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Allyn & Bacon, Inc., 731 F.2d 64 (1st Cir.), *cert. denied*, 469 U.S. 1018, 105 S. Ct. 433, 83 L.Ed.2d 359 (1984) 4

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 9

Kostiuk v. Town of Riverhead, 570 F. Supp. 603 (E.D.N.Y. 1983) 8

Miller v. Los Angeles County Bd. of Education, 827 F.2d 617 (9th Cir. 1987) 5

Perkins v. Hedricks, 340 F.3d 582 (8th Cir. 2003) 7

Prendergast v. Janecka, 2001 WL 793251 at *1 (E.D. Pa., July 10, 2001) 7

Sunn v. Dean, 597 F. Supp. 79 (N.D. Ga. 1984) 8

Treesh v. Taft, 122 F. Supp. 2d 887 (S.D. Ohio 2000) 7

Turner v. Wilkinson, 92 F. Supp. 2d 697 (S.D. Ohio 1999) 7

STATUTES

28 U.S.C. § 1915(g) 6

42 U.S.C. § 1988 ..... *passim*

42 U.S.C.A. § 1998e(d) 7

TABLE OF AUTHORITIES – Continued

Page

RULES

Rule 3.1 of the ABA Model Rules of Professional Conduct 6

Fed. R. Civ. P. 11 6

OTHER AUTHORITIES

141 Cong. Rec. S14, 413 (daily ed. Sept. 27, 1995) 3

INTEREST OF *AMICI CURIAE*

This case deals with a defendant's ability to recover attorney's fees pursuant to 42 U.S.C. § 1988 when forced to defend a frivolous federal civil rights claim. Through their respective Attorneys General, the *amici* States provide legal representation to various state agencies, officials, boards, and commissions, which are frequently the target of such claims. Defending against frivolous lawsuits costs the *amici* States substantial time and public money each year. The *amici* therefore have an interest in preserving the important tool Congress provided in 42 U.S.C. § 1988 for plaintiffs to pay in appropriate cases the attorney's fees incurred by States and others in defending against such suits.

SUMMARY OF THE ARGUMENT

The *amici* States provide legal representation to various state agencies, officials, boards, and commissions. Defending against frivolous litigation is a fact of life for the *amici* States, which are required to spend significant time and public money each year litigating such claims. Through the attorney's fees provision of 42 U.S.C. § 1988, Congress has provided an important tool for discouraging frivolous litigation and providing reimbursement to those individuals forced to defend against them. The statute explicitly places decisions regarding attorney's fees within the trial court's discretion. This Court, in *Hensley v.*

Eckerhart, 461 U.S. 424 (1983), reiterated the importance of trial court discretion, explaining that "[t]his [discretion] is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Petitioner seeks a dramatic revision of § 1988 law, which would effectively strip trial courts of their discretion to award attorney's fees in frivolous federal civil rights claims. Petitioner's proposed rule would deny attorney's fees in any case involving multiple factually-interrelated claims. Such a rule would ultimately encourage plaintiffs to tack on a multitude of additional claims to each complaint, resulting in increased frivolous litigation. Furthermore, this drastic approach is unnecessary, as the Court's precedents already provide the framework for addressing factually-interrelated frivolous and non-frivolous claims. The proposed rule is also inequitable, always operating to the benefit of the party responsible for bringing the frivolous claim and to the detriment of the innocent party forced to spend time and money defending against it. Finally, Petitioner's proposed approach would violate § 1988 by stripping trial courts of the discretion mandated by the statute. The *amici* States respectfully request that the Court reject Petitioner's proposed rule and continue to allow trial courts to exercise their discretion pursuant to the guidance provided in *Hensley*.

ARGUMENT

I. Frivolous federal civil rights claims work a significant hardship upon the States, which provide publicly-funded legal representation for the state officials, boards, agencies, and commissions often targeted by such suits.

The United States has a strong tradition of free and open access to the courts, permitting *pro se* litigation, appointment of counsel in some cases, and waiving of filing fees based upon indigency. A consequence of our accessible justice system is that some claims are frivolous, vexatious, or intended to harass. Defending against frivolous litigation is a fact of life for the *amici* States, which provide publicly-funded legal representation for state officials, boards, agencies, and commissions.[1] For the States, the availability of attorney's fees for a prevailing defendant under § 1988 is one important tool in discouraging frivolous litigation.

42 U.S.C. § 1988 states that "the court, in its discretion, may allow the prevailing party, other than

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[1] Reliable data as to the extent and cost of frivolous litigation is notoriously difficult to obtain. One frequently cited study was conducted by the National Association of Attorneys General and cited by Senator Robert Dole during the consideration of the Prison Litigation Reform Act. That study, conducted more than fifteen years ago, estimated the financial impact of frivolous federal civil rights litigation at approximately $81.3 million annually. 141 Cong. Rec. S14, 413 (daily ed. Sept. 27, 1995) (statement of Sen. Robert Dole).

the United States, a reasonable attorney's fee as part of the costs." This Court's precedents establish that (1) defendants can recover attorney's fees under § 1988 only when the plaintiff's claims are frivolous; (2) a party can recover attorney's fees under § 1988 even when it prevails on some, but not all, claims; and (3) the award of attorney's fees is within the discretion of the trial court. *See Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978); *Hughes v. Rowe*, 449 U.S. 5, 14 (1980); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Under these precedents a district court properly exercises its discretion by awarding a prevailing defendant attorney's fees under § 1988 for successfully defending against a frivolous claim, even when interrelated state-law claims remain to be resolved in state court.

A claim is frivolous if a reasonable person would have recognized the claim as meritless. *Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 946 F. Supp. 147, 150 (D.R.I. 1996). Several factors are relevant in determining whether a claim is frivolous. One factor is whether the claim survived pretrial dispositive motions. *E.E.O.C. v. Kimbrough Investment Co.*, 703 F.2d 98, 103 (5th Cir. 1983); *E.E.O.C. v. Northwest Structural Components*, 897 F. Supp. 249, 252 (M.D.N.C.1995). Another factor is whether the plaintiff has established a *prima facie* case. *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir.), *cert. denied*, 469 U.S. 1018, 105 S. Ct. 433, 83 L.Ed.2d 359 (1984). Other factors include whether the defendant

offered to settle the case and whether the trial court disposed of the case without trial. *E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746 (3d Cir. 1997). These are merely factors rather than hard and fast rules, and determinations whether a claim is frivolous are to be made on a case-by-case basis.

Where a claim is found to be legally frivolous, the trial court may exercise its discretion in assessing a fee award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). For example, whether a plaintiff was represented by counsel or proceeded *pro se* will be taken into account in determining whether to award fees to a successful defendant for a frivolous suit, because it cannot be assumed that *pro se* plaintiffs and attorney-represented plaintiffs have the same ability to recognize a claim's objective merit or lack of merit. *Miller v. Los Angeles County Bd. of Education*, 827 F.2d 617 (9th Cir. 1987). Similarly, the indigency of the plaintiff may affect the size of any attorney's fee award to the defendant. *See Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911 (11th Cir. 1982); *Colucci v. New York Times Co.*, 533 F. Supp. 1011 (S.D.N.Y. 1982). And, where multiple claims are involved, each party's overall degree of success in the case should be considered. *Hensley*, 461 U.S. at 436-37.

Currently, § 1988 allows trial courts the necessary flexibility and discretion to deal with frivolous federal claims on a case-by-case basis. Petitioner asks this Court to eliminate that discretion and to adopt a bright-line rule denying attorney's fees in all lawsuits where any other factually related claims may still be

pending, even in another court. The *amici* States respectfully submit that the Court should reject Petitioner's proposal. Section 1988 is an important tool for discouraging frivolous and vexatious litigation in those relatively rare instances in which district courts deem a fee award to the defendant appropriate, and Congress correctly placed those decisions firmly within the trial court's discretion.

II. The attorney's fee provision of § 1988 is among several tools lawmakers have created to help discourage frivolous litigation.

Lawmakers have provided litigants and the courts several tools aimed at discouraging frivolous litigation. For example, Rule 11 of the Federal Rules of Civil Procedure prohibits attorneys and unrepresented parties from presenting any pleading, written motion, or other paper for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, which is not warranted by existing law or by a non-frivolous argument for changing the law, or not supported by evidence. Fed. R. Civ. P. 11. Similarly, Rule 3.1 of the ABA Model Rules of Professional Conduct prohibits, as a matter of professional ethics, the filing of frivolous claims. Finally, the Prison Litigation Reform Act (PLRA) mandates that a prisoner who has had three cases dismissed as frivolous, malicious, or failing to state a claim for relief may not proceed *in forma pauperis* in a civil action unless the prisoner is under imminent danger of serious physical injury. 28 U.S.C.

§ 1915(g). The PLRA also includes other protections against frivolous federal civil rights claims brought by currently-incarcerated inmates, including its own attorney's fee provision.[2]

Section 1988 is one essential component for combating frivolous litigation in situations where the PLRA does not apply, including cases (1) filed by those who have been civilly committed, *see Perkins v. Hedricks*, 340 F.3d 582, 583 (8th Cir. 2003); (2) filed by former prisoners, *see Ahmed v. Dragovich*, 297 F.3d 201, 210 n.10 (3d Cir. 2002); (3) filed by prisoners while incarcerated who then amended their complaints after release, *see Prendergast v. Janecka*, 2001 WL 793251 at *1 (E.D. Pa., July 10, 2001); (4) filed on behalf of prisoners after the prisoner's death, *see Treesh v. Taft*, 122 F. Supp. 2d 887, 890 (S.D. Ohio. 2000); (5) filed by relatives bringing an action for a prisoner's death (*Id.*); (6) brought by a group of plaintiffs that include both prisoners and non-prisoners, *Turner v. Wilkinson*, 92 F. Supp. 2d 697, 704 (S.D. Ohio 1999); or (7) filed by all non-prisoners, including the large number of civil rights suits filed against the States each year by non-prisoner plaintiffs. For all of the claims not covered by the PLRA, § 1988 is one of the only tools available to deter frivolous litigation and provide some measure of protection for defendants forced to defend such suits.

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[2] The PLRA, intended to discourage frivolous litigation, contains a provision that restricts a plaintiff's ability to recover attorney's fees. 42 U.S.C.A. § 1998e(d)

For example, in *Harbulak v. County of Suffolk*, 654 F.2d 194 (2nd Cir. 1981), a driver sued when at a traffic stop the officer placed the ticket on his car dash. *Harbulak*, 654 F.2d at 195. The Second Circuit affirmed the district court's finding that the claim was frivolous, and ordered that plaintiff pay attorney's fees to the defendant. *Id.* at 198.

In *Sunn v. Dean*, 597 F. Supp. 79 (N.D. Ga. 1984), the plaintiff sued the jurors who had returned a verdict against him in a previous suit. *Sunn*, 597 F. Supp. at 80. The court found the claim so outrageous as to justify an award of attorney's fees to the defendant pursuant to § 1988. *Id.* at 83-84.

In *Kostiuk v. Town of Riverhead*, 570 F. Supp. 603 (E.D.N.Y. 1983), a woman sued the Town of Riverhead and the town dog catcher for picking up her dog and holding it overnight. *Kostiuk*, 570 F. Supp. at 605. The court found the claim to be legally frivolous and awarded the town $250 in legal fees pursuant to § 1988. *Id.* at 612. As these cases illustrate, § 1988 provides the trial court with one tool to address frivolous claims in the most egregious cases.

III. 42 U.S.C. § 1988 mandates that trial courts be given the discretion to equitably determine appropriate fee awards.

42 U.S.C. § 1988 specifically provides that "the court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added).

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), Justice Powell explained that, "[t]his [discretion] is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* at 437. Deference to the trial court's discretion in awarding attorney's fees is also appropriate where the fees are assessed against a plaintiff pursuant to a finding that his claim was frivolous. The Court should, therefore, reaffirm the *Hensley* rule and defer to the trial court's decision to award attorney's fees to Respondent.

Pursuant to *Hensley*, a trial court's discretion is to be guided by the twelve factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Hensley*, 461 U.S. at 430. These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at n.4 (citing *Johnson*, 488 F.2d at 717-19). The *Hensley* court specifically focused on the importance of the eighth factor, the "amount involved and the results

obtained," explaining that the party's relative level of success is especially important in determining a fee award. *Id.*

Petitioner seeks a dramatic revision of § 1988 law, which would effectively strip courts of their discretion to award attorney's fees for frivolous federal civil rights claims and could encourage litigants to tack on a multitude of additional claims to each complaint. The Court should reject this approach. Nothing, either in the case at bar or in the broader development of § 1988 law, indicates that when Congress said that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" it intended to deny those courts that discretion in any case involving multiple factually-interrelated claims. "Discretion" means discretion, and the trial court in this case exercised its discretion exactly as anticipated by Congress and by this Court in *Hensley v. Eckerhart*.

IV. Petitioner's proposed rule is inequitable, unnecessary, and violates § 1988 by stripping the trial courts of discretion.

Petitioner argues that trial courts cannot adequately determine fee awards where the frivolous claims upon which the award is to be granted were factually-intertwined with remaining claims, and that this Court should preclude any fee award in all such situations. However, this issue is not a new one. The Court in *Hensley v. Eckerhart*, 461 U.S. 424

(1983) stated that a party may be "deemed 'prevailing' even though he succeeded on only some of his claims for relief." *Hensley*, 461 at 434. In fact, the Court directly addressed the situation of factually intertwined claims, stating that,

> the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Hensley, 461 U.S. at 435. The Court explicitly rejected a proposed mathematical approach and emphasized the need to rely upon the trial court's discretion in determining the proper amount of any fee award. *Hensley*, 461 U.S. at 428.

In the present case, the trial court properly exercised its discretion in considering a fee award to the defendants, noting that "Defendant's [sic] do not appear to request attorney's fees related to the defense of the state-law claims remanded for decision to the Louisiana state court." Pet. App. 12a. However, even where interrelated claims pose difficulty in dividing the hours worked by attorneys on a claim-by-claim basis, that difficulty does not justify Petitioner's

drastic solution of denying attorney's fees altogether. Such a rule would be even more inequitable than the rigid mathematical approach rejected in *Hensley*, and would completely divest trial courts of discretion to award attorney's fees.

Petitioner urges the Court to adopt a new rule under which a defendant who has successfully defeated a frivolous civil rights claim may not recover any attorney's fees under § 1988 if the frivolous claim was factually intertwined with any remaining state claim no matter the merit of the state-law claim. Indeed, in the present case there has been no determination whether Petitioner's state-law claims were frivolous. To create a rule that would allow a plaintiff to avoid any fee award simply by asserting some number of additional, possibly frivolous, state-law claims would completely contravene the purposes of § 1988. Its practical effect would be to encourage plaintiffs to tack on as many additional claims to each complaint as they can, regardless of their merit. This would drastically increase the workload of both the courts and the state offices charged with defending such suits.

In each of the above-cited examples of frivolous federal civil rights suits in which attorney's fees were awarded pursuant to § 1988, the plaintiff could easily have added state-law claims, meritorious or not, to his federal claims and would, under Plaintiff's proposal, have thereby avoided paying any fees. For example, in nearly every case cited above, the plaintiff could easily have added a state claim for

intentional infliction of emotional distress, just as Petitioner did in this case. Alternatively, Plaintiffs in the above cases could have added state-law claims of negligence, nuisance, fraud, false imprisonment, conversion, detinue, assault, battery, trespass, invasion of privacy and conspiracy. Even though such claims might fail on their merits, they would have been sufficient to prevent an attorney's fee award under the Petitioner's proposed rule.

Amici agree with the appellate court in this case, and with the Ninth[5] and Eleventh Circuits, that "it would 'undermine the intent of Congress to allow plaintiffs to prosecute frivolous claims without consequences merely because those claims were joined'" with additional claims. Pet. App. 10a (citing *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1064 (9th Cir. 2006); *Quintana v. Jenne*, 414 F.3d 1306, 1312 (11th Cir. 2005); *Head v. Medford*, 62 F.3d 351, 356 (11th Cir. 1995)). Rather than discouraging frivolous litigation, such a rule could encourage litigants to add multiple additional claims to their complaint in an attempt to avoid attorney's fees.

Such a result is entirely unnecessary. Under existing precedent, trial courts are already instructed to consider "the amount involved and the results obtained," or the relative level of success achieved by each party, when making discretionary decisions

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[5] *But see Harris v. Maricopa County Superior Court*, No. 09-15833, 2011 WL 187040 (9th Cir. Jan. 20, 2011).

regarding fee awards under § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983). Where the plaintiff's state-law claims are a focus of litigation or clearly have merit, the trial court is already authorized to take that fact into consideration.

Petitioner attempts to support his proposed rule by arguing that Respondent should not recover for any legal work that could be used in the future to defend against Petitioner's state-law claims or which Respondent would have needed to perform even if the federal claims had not been included in the case. Pet. Br. 32. However, these arguments make clear that Petitioner's real concern is not that Respondent was wrongfully awarded fees for work unrelated to the frivolous claims, but that the work necessary to defend the frivolous claims might later also be used to defend against his state claims. Petitioner's argument seems to assume that Respondent would have an advantage in defending the state-law claims if he were allowed to rely upon legal work for which Petitioner has paid attorney's fees. However, any advantage that Respondent may have in defending the state-law claims as a result of the fee award could easily have been avoided by the Petitioner simply by not bringing the frivolous federal claims in the first place. Moreover, plaintiffs as well as defendants may benefit from legal work done in furtherance of the frivolous claims. For example, plaintiffs may gain access to discovery in pursuing the frivolous claims that they later use in prosecuting their state-law claims. Additionally, Petitioner's argument fails

because it is based only upon his guess as to the legal work necessary to defend against his state-law claims. However, under the current approach, it is already within the trial court's discretion, when assessing fees, to consider a plaintiff's concerns regarding the defendant's ability to use legal work covered by the fee award in future litigation. In the case at bar, the facts simply establish that the Respondent did expend a specified amount of time, effort, and money defending against the frivolous claims and was entitled to fees under § 1988, and the court was not persuaded to reduce the award based upon speculation that the burden Respondent bore in defending a frivolous lawsuit may possibly make it easier for him to defend against Petitioner's state-law claims.

Finally, the Court should reject the Petitioner's proposed approach because it will always operate in favor of the party at fault, the plaintiff found to have brought a frivolous claims, and at the expense of an innocent defendant forced to defend such claims. This is a far cry from the equitable outcome mandated by this Court in *Hensley*.

42 U.S.C. § 1988 mandates that decisions regarding attorney's fees rest firmly within the court's discretion. This Court affirmed the absolute need to rely on the trial court's discretion in *Hensley*, in which it provided ample guidance for lower courts as to how that discretion should be exercised. The *Hensley* factors have provided sufficient direction to lower courts for over two decades and should not be

abandoned now in favor of Petitioner's inequitable rule denying attorney's fees in all cases involving factually-interrelated claims. To do so would defy both the letter and the spirit of § 1988.

CONCLUSION

For the foregoing reasons, this Court should affirm the Fifth Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-114

Supreme Court, U.S.
DEC 30 2010
CLERK

IN THE

Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton, and TOWN OF VINTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE LIBERTY INSTITUTE, CATO INSTITUTE, INDEPENDENCE LAW CENTER, INSTITUTE FOR JUSTICE TEXAS CHAPTER, AND JAMES MADISON CENTER FOR FREE SPEECH AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

Should civil rights defendants be awarded all of the attorneys' fees incurred in defending unsuccessful federal civil rights claims where those claims are intertwined with other claims directed at the same illegal conduct?

Should civil rights defendants be allowed mid-litigation fee awards based on unsuccessful federal claims, even though such awards could derail otherwise meritorious suits on related state claims?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. SECTION 1988 REFLECTS CONGRESS'S USE OF ECONOMIC INCENTIVES TO ENCOURAGE PRIVATE ENFORCEMENT OF FEDERAL CIVIL RIGHTS 5

II. UNLESS REVERSED, THE FIFTH CIRCUIT'S RULING WILL CHILL PRIVATE ENFORCEMENT OF CIVIL RIGHTS, CONTRARY TO CONGRESS'S PURPOSE 9

A. Plaintiffs Who Cannot Confidently Predict Outcomes On The Numerous Threshold Objections Available To Civil Rights Defendants Will Be Chilled From Bringing Meritorious Claims 9

B. Awarding Fees Mid-Litigation Risks Derailing Meritorious Civil Rights Suits 13

C. Fee Awards Should Not Be Imposed Against Plaintiffs Who Drop Federal Claims To Preserve Their Choice Of Forum 14

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Page(s)

Ballen v. *City of Redmond*, 466 F.3d 736 (9th Cir. 2006) 3

Barrow v. *Greenville Independent School District*, 2002 WL 255484 (N.D. Tex. Feb. 20, 2002) 10

Barrow v. *Greenville Independent School District*, 2002 WL 628665 (N.D. Tex. Apr. 18, 2002) 11

Barrow v. *Greenville Independent School District*, 332 F.3d 844 (5th Cir. 2003) 1, 11

Barrow v. *Greenville Independent School District*, 480 F.3d 377 (5th Cir. 2007) 11

Barrow v. *Greenville Independent School District*, 552 U.S. 888 (2007) 11

Barrow v. *Greenville Independent School District*, 2007 WL 3085028 (5th Cir. Oct. 23, 2007) (unpublished) 11

Dean v. *Riser*, 240 F.3d 505 (5th Cir. 2001) 15

Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 9, 13

Hudson v. *Michigan*, 547 U.S. 586 (2006) 7

Monell v. *New York City Department of Social Services*, 436 U.S. 658 (1978) 9

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 6

Oliveri v. *Thompson*, 803 F.2d 1265 (2d Cir. 1986) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Pagan v. *Fruchey*, 492 F.3d 766 (6th Cir. 2007) (*en banc*) 3

Patsy v. *Board of Regents of State of Florida*, 457 U.S. 496 (1982) 14

Perdue v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010) 9

Randall v. *Sorrell*, 548 U.S. 230 (2006) 3

Republican Party of Minnesota v. *White*, 536 U.S. 765 (2002) 3

Smith v. *Barrow*, 540 U.S. 1005 (2003) 11

Snell v. *City of York*, 564 F.3d 659 (3d Cir. 2009) 2

Texas State Teachers Ass'n v. *Garland Independent School District*, 489 U.S. 782 (1989) 13

U.S. Steel Corp. v. *United States*, 519 F.2d 359 (3d Cir. 1975) 8

DOCKETED CASES

Brief of Americans United for Separation of Church and State, Center for Inquiry, Center for Public Representation, Institute for Justice, Liberty Legal Institute, People for the American Way Foundation, Public Citizen, and the Rutherford Institute as *Amici Curiae* in Support of Respondents, *Sole* v. *Wyner*, 551 U.S. 74 (2007), *available at* 2007 WL 1022675 4

TABLE OF AUTHORITIES—Continued

Page(s)

Brief of *Amici Curiae* Alliance Defense Fund and Cato Institute in Support of Respondent, *Connick* v. *Thompson*, No. 09-571, *available at* 2010 WL 3232484 2

Brief *Amicus Curiae* of Cato Institute and Pacific Legal Foundation in Support of Petitioners, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), *available at* 2009 WL 4030387 2

Brief *Amici Curiae* of Liberty Legal Institute, American Center for Law and Justice, Cato Institute, Institute for Justice, Liberty Counsel, Alliance Defense Fund, James Madison Center for Free Speech in Support of Respondents, *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010), *available at* 2009 WL 2777657 3

STATUTES

42 U.S.C. § 1988 ..... *passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1558 (1976) 6, 8

S. Rep. No. 94-1011 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908 9

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Admin. Office of the U.S. Courts, 2009 Annual Report of the Director, *Judicial Business of the United States Courts* (2009) 6

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Page(s)

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Eisenberg, Theodore & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987) 14

Schwab, Stewart J. & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719 (1988) 7

Tobias, Carl, *Rule 11 & Civil Rights Litigation*, 37 Buff. L. Rev. 485 (1989) 7

INTEREST OF *AMICI CURIAE*

Amici are libertarian and conservative advocacy institutions dedicated to the defense of liberty and our constitutional traditions, including but not limited to free speech and religious freedom. Several *amici* have deep experience as litigants under the civil rights provisions enumerated in 42 U.S.C. § 1988 and are gravely concerned that the Fifth Circuit's judgment in this case, if not reversed, will chill the private enforcement of civil rights, contrary to Congress's purpose in enacting the fee-shifting provision.[1]

Liberty Institute is a legal organization devoted to the defense of religious freedoms and First Amendment rights, representing individuals and institutions across the country. Liberty Institute is committed to the principles of limited government, robust protections of constitutional freedoms, and government accountability. Liberty Institute has considerable experience in civil rights litigation, including argument and numerous appearances before this Court, and frequently serves as counsel in litigation subject to 42 U.S.C. § 1988. *See, e.g.*, *Barrow* v. *Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003) (public school teacher denied promotion because she enrolled her children in private religious school). Liberty Institute is greatly concerned about the threat this case poses to

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

the Nation's privatized system of civil rights enforcement.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, and publishes the annual Cato Supreme Court Review. While the Cato Institute does not itself bring lawsuits, many of the *amicus* briefs it files support civil rights claims. *See, e.g.*, Brief of *Amici Curiae* Alliance Defense Fund and Cato Institute in Support of Respondent, *Connick* v. *Thompson*, No. 09-571, *available at* 2010 WL 3232484 (plaintiff unconstitutionally convicted and sentenced to death because prosecutor hid exculpatory evidence); Brief *Amicus Curiae* of Cato Institute and Pacific Legal Foundation in Support of Petitioners, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), *available at* 2009 WL 4030387 (unconstitutional ban on handgun possession).

The Independence Law Center is a pro bono law firm located in Harrisburg, Pennsylvania, focusing on civil rights and public policy litigation. The Independence Law Center frequently serves as counsel in litigation subject to 42 U.S.C. § 1988 involving such issues as speech outside of abortion clinics, the level of protection to be afforded to adult businesses, freedom of expression and free exercise of religion for students, prayer in public places, parental rights, and religious exercise in private daycare. *See, e.g.*, *Snell* v. *City of York*, 564 F.3d 659 (3d Cir. 2009) (pro-life counselor arrested in

violation of the First Amendment). In the experience of the Center and its staff, the primary question raised by prospective civil rights plaintiffs is whether bringing suit could expose them to personal liability. Most prospective plaintiffs are not in a position to pay their own attorney, let alone risk incurring liability for a defendant's attorney's fees.

The Institute for Justice is our Nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute for Justice seeks a rule of law under which individuals can control their destinies as free and responsible members of society. The Institute for Justice frequently serves as counsel in litigation subject to 42 U.S.C. § 1988. *See, e.g., Pagan* v. *Fruchey*, 492 F.3d 766 (6th Cir. 2007) (*en banc*) (unconstitutional restriction on commercial speech); *Ballen* v. *City of Redmond*, 466 F.3d 736 (9th Cir. 2006) (same).

The James Madison Center for Free Speech is a not-for-profit public interest organization dedicated to defending the rights of political expression and association guaranteed by the First Amendment. The Madison Center frequently serves as counsel in litigation subject to 42 U.S.C. § 1988, including several cases before this Court. *See, e.g., Randall* v. *Sorrell*, 548 U.S. 230 (2006) (unconstitutional restrictions on campaign contributions and expenditures); *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002) (unconstitutional restriction on judicial candidates' speech).

In addition to the cases mentioned above, several of the undersigned *amici* submitted *amicus* briefs in recent cases in this Court involving attorney's fees in civil

rights cases. *See* Brief *Amici Curiae* of Liberty Legal Institute, American Center for Law and Justice, Cato Institute, Institute for Justice, Liberty Counsel, Alliance Defense Fund, James Madison Center for Free Speech in Support of Respondents, *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010), *available at* 2009 WL 2777657; Brief of Americans United for Separation of Church and State, Center for Inquiry, Center for Public Representation, Institute for Justice, Liberty Legal Institute, People for the American Way Foundation, Public Citizen, and the Rutherford Institute as *Amici Curiae* in Support of Respondents, *Sole* v. *Wyner*, 551 U.S. 74 (2007), *available at* 2007 WL 1022675.

SUMMARY OF ARGUMENT

Civil rights suits, though essential to the enforcement of civil rights, are notoriously difficult and expensive to bring and win. Congress enacted the fee-shifting provision of 42 U.S.C. § 1988 to address this impediment by creating economic incentives to encourage private enforcement of civil rights. In this case, the Fifth Circuit misapplied Section 1988 in a way that, unless corrected, will create an economic *disincentive* to the bringing of federal civil rights claims, exactly contrary to congressional purpose.

First, civil rights defendants typically raise numerous threshold jurisdictional, procedural, and substantive objections and defenses, many of which depend on uncertain areas of the law or on factual predicates inaccessible to plaintiffs at the outset of a case. A plaintiff's initial assessment of his claim is necessarily uncertain. By awarding the defendant fees for the entire suit based on the dismissal of one claim, the Fifth Circuit's

decision imposes prohibitive costs on the enforcement of civil rights.

Second, the exceptional timing of the fee award in this case—before resolution of the plaintiff's related state-law claims—creates a dangerous precedent that threatens to derail meritorious civil rights suits. Like plaintiffs in other complex litigations, civil rights plaintiffs frequently and appropriately narrow the issues as the case unfolds. The threshold arguments available to civil rights defendants further encourage this step-wise narrowing. By prematurely deeming a plaintiff's suit frivolous and immediately ordering the plaintiff to pay the defendant's fees before the conclusion of the litigation, the Fifth Circuit's rule imposes financial penalties that would shut down meritorious suits midstream.

Third, this Court should not permit fee awards in situations where a plaintiff dismisses a federal claim in order to secure a remand of related state-law claims to state court. Otherwise, the threat of a fee award will improperly burden the plaintiff's decision to bring a federal claim in state court at all. *Amici* respectfully submit that, in addition to reversing the judgment below, the Court should reinforce that a fee award is improper when a plaintiff voluntarily drops a federal claim in order to return to state court.

ARGUMENT

I. Section 1988 Reflects Congress's Use Of Economic Incentives To Encourage Private Enforcement of Federal Civil Rights

42 U.S.C. § 1988 facilitates the private enforcement of civil rights by citizens in cases where the government itself violates those rights. As the House Judici-

ary Committee observed when it reported Section 1988:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens ... In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality ... Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts .... [42 U.S.C. § 1988] is designed to give such persons effective access to the judicial process[.]

H.R. Rep. No. 94-1558, at 1 (1976).

"This private enforcement system decentralizes enforcement decisions ... and helps insulate enforcement from capture by established interests" and "is also less expensive for taxpayers." Albiston & Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. Rev. 1087, 1090 (2007). By enacting Section 1988, Congress harnessed free market principles, creating an economic incentive for citizens to vindicate their civil rights directly rather than relying exclusively on enforcement actions by the federal government itself.

Recent data confirm the importance of private enforcement. Of the 33,761 civil rights suits in federal courts last year, the United States brought only 423—scarcely more than 1%. *See* Admin. Office of the U.S. Courts, 2009 Annual Report of the Director, *Judicial Business of the United States Courts*, tbl. C-2 (2009). Private parties—which this Court has called "private attorney[s] general," *Newman* v. *Piggie Park Enters.*,

Inc., 390 U.S. 400, 402 (1968)—bear almost the whole burden of enforcing civil rights.

As this Court has recognized, the fee-shifting provision is the engine that sustains this private enforcement:

> [The petitioner] complains that "it would be very hard to find a lawyer to take a case such as this," *but 42 U.S.C. § 1988(b) answers this objection.* Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs.

Hudson v. *Michigan*, 547 U.S. 586, 597-598 (2006) (emphasis added) (citation omitted). Because the recoverable monetary damages in a civil rights case are often far smaller than the cost of litigation, and the victims of civil rights violations are often individuals of ordinary means, plaintiffs are exceedingly sensitive to fee-shifting rules.[2]

Congress's recognition of the importance of fee-shifting to civil rights plaintiffs is reflected not only in the availability of fee awards *in favor* of plaintiffs, but also in its reaction to the threat of fee awards *against* plaintiffs. When it reported Section 1988, the House

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[2] The same is true of counsel for many civil rights plaintiffs. *See* Tobias, *Rule 11 & Civil Rights Litigation*, 37 Buff. L. Rev. 485, 496 n.41 (1989) ("The civil rights bar is comprised essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income."); Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 768-769 (1988) ("local, small-firm lawyer[s]" bring "the bulk of constitutional tort litigation").

Judiciary Committee emphasized that the legislation borrowed language that this Court had already interpreted to prevent a "chilling effect." H.R. Rep. No. 94-1558, at 7. The report acknowledged that "courts have developed a different standard for awarding fees to prevailing defendants because they do 'not appear before the court cloaked in the mantle of public interest.'" *Id.* at 6 (quoting *U.S. Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3d Cir. 1975)). The Committee referenced case law holding that "an award may be made [to the defendant] only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely 'to harass or embarrass' the defendant." *Id.* at 7 (quoting *U.S. Steel*, 519 F.2d at 364). "[I]f the action is not brought in bad faith, such fees should not be allowed." *Id.* The Committee emphasized that civil rights defendants should not enjoy "the same standard of recovery" as civil rights plaintiffs:

> With respect to the awarding of fees to prevailing defendants, it should further be noted that governmental officials are frequently the defendants in cases brought under [Section 1988]. Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. Applying the same standard of recovery to such defendants would further widen the gap between citizens and government officials and would exacerbate the inequality of litigating strength.

Id. The Senate Judiciary Committee similarly reported: "'[P]rivate attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they

lose." S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912.

Accordingly, this Court has held that, under Section 1988, "[a] prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 n.2 (1983).

II. Unless Reversed, The Fifth Circuit's Ruling Will Chill Private Enforcement Of Civil Rights, Contrary To Congress's Purpose

The Fifth Circuit's decision departs from the market-based principles that Congress employed to encourage private enforcement of federal civil rights. Unless reversed, the decision will chill private enforcement because of the uncertainty inherent in civil rights suits and the threat of mid-litigation fee awards, effectively creating an economic *disincentive* to bringing federal civil rights claims at all, contrary to Congress's stated purpose.

A. Plaintiffs Who Cannot Confidently Predict Outcomes On The Numerous Threshold Objections Available To Civil Rights Defendants Will Be Chilled From Bringing Meritorious Claims

A civil rights plaintiff often confronts "a host of complex procedural, as well as substantive, objections" that collectively render a civil rights suit "lengthy and arduous." *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1681 (2010) (Breyer, J., concurring in part and dissenting in part). Civil rights defendants commonly invoke qualified immunity, standing, ripeness, mootness, abstention, limitations on municipal liability pursuant to *Monell* v. *Department of Social Services*, 436

U.S. 658 (1978), and pleading requirements—each of which can entail substantial delay and uncertainty. It is often impossible for a plaintiff to predict which arguments will even be asserted, much less what discovery will yield, how a court will rule, and whether the court will conclude that an ultimately unsuccessful claim warrants a fee award. The Fifth Circuit's decision risks chilling civil rights plaintiffs from bringing meritorious claims, simply because of the difficulty of predicting the outcomes of the many threshold defenses available to civil rights defendants. *See, e.g.*, *Oliveri* v. *Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) ("[I]t is extremely unlikely that before formal discovery any citizen would or could be in possession of such information [regarding improper training and supervision by a government defendant]; consequently, if sanctions were to bar possible exploration of such claims, the agency would be effectively immunized even if it were engaged in unconstitutional policies and practices.").

Amici have litigated dozens of meritorious civil rights cases that presented this unavoidable uncertainty. In one example, *amicus* Liberty Institute represented Karen Jo Barrow, an accomplished public school teacher who was denied a promotion because she chose to enroll her children in a private religious school. Ms. Barrow filed suit against both the superintendent and the school district in May 2000, and the defendants asserted typical threshold defenses. After two years of litigation, the district court granted summary judgment in favor of the superintendent on grounds of qualified immunity. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 2002 WL 255484 (N.D. Tex. Feb. 20, 2002). A year later, the Fifth Circuit reversed that decision, holding that its precedents left "no doubt that public-school employees like Barrow have a protected right to edu-

cate their children in private school" and that "no reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was constitutional." *Barrow* v. *Greenville Indep. Sch. Dist.*, 332 F.3d 844, 848-849 (5th Cir. 2003). The superintendent petitioned for certiorari, which this Court denied. *Smith* v. *Barrow*, 540 U.S. 1005 (2003).

Meanwhile, in separate motion practice regarding the school district defendant, the district court granted summary judgment as to one aspect of Ms. Barrow's Section 1983 claim, ruling that the unconstitutional acts were not pursuant to a policy under *Monell*. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 2002 WL 628665, at *2 (N.D. Tex. Apr. 18, 2002). However, the court denied the school district's motion for summary judgment on another theory under Section 1983, because Ms. Barrow presented evidence that the constitutional violations occurred pursuant to a custom or practice. *See id.* at *6. At the same time, the court granted summary judgment for the school district on some Title VII religious discrimination claims, but allowed alternate claims. *See id.* at *7-9. The Fifth Circuit later affirmed these rulings, and this Court again denied certiorari. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 480 F.3d 377 (5th Cir.), *cert. denied*, 552 U.S. 888 (2007).

Finally, after five years of litigation, Ms. Barrow's claims were heard by a jury, which awarded damages against the superintendent in the amount of $35,455. The district court added costs and attorneys' fees of almost twenty times that amount: $654,068. The Fifth Circuit affirmed, seven and a half years after Ms. Barrow filed suit. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 2007 WL 3085028, at *2 (Oct. 23, 2007) (unpublished).

Karen Barrow is exactly the sort of plaintiff Section 1988 was enacted to protect: a private citizen who vindicated her civil rights through her own efforts and those of private counsel, rather than by relying on the enforcement resources of the Department of Justice or another federal agency. It took Ms. Barrow seven years and over $650,000 in legal expenses to prevail on a claim worth $35,455. Congress enacted Section 1988 to encourage Ms. Barrow to assert that claim with the assurance that, if she persevered and succeeded, she would be able to recover her attorney's fees—a necessary incentive given that her claim against a powerful government defendant (indeed, against her own employer) did not promise a judgment remotely large enough to fund the ordeal that she was required to endure.

Under the Fifth Circuit's decision, however, a scrupulous lawyer would have had to advise Ms. Barrow at the outset that her lawsuit not only might cost her seven years of effort, but also posed the risk that, if a court found that failure on a threshold or procedural matter rendered *part* of her suit unreasonable, she (like Petitioner Fox here) could be ordered to pay *all* of the defendants' attorney's fees, even fees that would have been expended to address related, meritorious claims. On that backdrop, a cautious lawyer or plaintiff would be well-advised not to file a federal civil rights claim at all, but instead to proceed only on other claims that do not carry the host of unpredictable side issues that have arisen under federal civil rights laws. The consequence would be economic incentives that actually *discourage* federal civil rights claims, the opposite of what Congress intended for Section 1988.

To preserve private enforcement, the Court should rule that Section 1988 does not authorize an award of

fees incurred defending multiple intertwined claims unless the court concludes that *all* the intertwined claims were "vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley*, 461 U.S. at 429 n.2.

B. Awarding Fees Mid-Litigation Risks Derailing Meritorious Civil Rights Suits

The Fifth Circuit's error was compounded by its decision to award fees against the plaintiff before the conclusion of the overall litigation. Awarding fees mid-litigation risks derailing meritorious civil rights suits for two reasons.

First, a premature award of fees is based on an incomplete, and possibly misleading, assessment of the basis for the plaintiff's allegations. Here, the district court in this case awarded fees when the record suggested that Petitioner could not prove a Section 1983 claim. The broader facts—most notably those developed in the parallel criminal proceeding against Respondent Vice—supported Petitioner's resolve to pursue his additional state-law claims. Most civil rights plaintiffs are not so fortunate; a mid-litigation fee award might well end the entire suit by ruining the plaintiff's financial ability to develop a factual record. *Cf. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989) ("Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees[.]").

Second, in addition to generating capricious results in pending cases, the prospect of mid-litigation fee awards creates disproportionate one-sided incentives against bringing federal civil rights claims at all. As noted above, fee awards can be large compared to re-

coverable damages and the resources of a plaintiff and her counsel, and civil rights cases typically last longer than other complex litigation. *See, e.g.*, Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 672 (1987) (constitutional tort suits last longer than other suits and are more likely than other suits to require more than five years to litigate). The possibility that a defendant might collect a fee award mid-litigation, years before the plaintiff is entitled to recover damages for meritorious claims, provides a strong reason for a plaintiff not to bring a federal civil rights claim.

Accordingly, the Court should rule that Section 1988 does not authorize a mid-litigation fee award based on the dismissal of one claim before the resolution of related claims.

C. Fee Awards Should Not Be Imposed Against Plaintiffs Who Drop Federal Claims To Preserve Their Choice Of Forum

As the Fifth Circuit acknowledged, fees should not be awarded against plaintiffs who voluntarily drop federal claims in order to preserve their choice of state court as a forum. When Congress passed the Civil Rights Act of 1871, "legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Patsy* v. *Board of Regents of State of Fla.*, 457 U.S. 496, 506 (1982). When a plaintiff files in state court and a same-state defendant removes the suit to federal court, the plaintiff may then choose whether to drop the federal claim to secure a remand to the state forum. The Fifth Circuit has correctly noted that "[t]his type of strategic decision reveals nothing about the merits of a plaintiff's case but merely indi-

cates his preferred forum. As such, it does not warrant a conclusion that a defendant in such a case has prevailed within the meaning of § 1988." *Dean* v. *Riser*, 240 F.3d 505, 510 (5th Cir. 2001) (citations omitted); *see also* Pet. App. 6a & n.14 (citing *Dean*, 240 F.3d at 510).

This Court should not permit a fee award against a plaintiff who sues in state court and, in response to removal to federal court, voluntarily dismisses a federal claim in order to secure a remand to the state forum. Otherwise, plaintiffs would either (a) maintain federal claims they would rather drop in federal courts they would rather leave—contrary to the principle that the plaintiff is the master of the complaint and the forum—or (b) not bring federal civil rights claims in state court at all, in order to guard against the risk of removal, contrary to Congress's decision that civil rights be enforced in state as well as federal courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2010

AMICUS CURIAE BRIEF

Case No. 10-114

In the Supreme Court of the United States

RICKY D. FOX,

Petitioners,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton, AND TOWN OF VINTON,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Authorities ii

Interest of the *Amici Curiae* 1

Summary of Argument 4

Argument 7

I. A Frivolous Section 1983 Claim Substantially Increases the Cost of Defending a Lawsuit 7

II. Decision Below Enforces this Court's Limits on Section 1983 Liability 14

III. Plaintiffs Across the Country Frequently File Frivolous Section 1983 Claims 19

Conclusion 23

TABLE OF AUTHORITIES

CASES — PAGE

Butcher v. Guthrie,
2007 U.S. Dist. LEXIS 84182 (E.D. Tex. Nov. 14, 2007) 22

Christiansburg Garment Co. v. EEOC,
434 U.S. 412, (1978) 4, 13, 18

City of Oklahoma v. Tuttle,
471 U.S. 808 (1985) 16

Hensley v. Eckerhart,
461 U.S. 424 (1983) 18

Hughes v. Rowe,
449 U.S. 5 (1980) 4

Ingram v. Strother,
2009 U.S. Dist. LEXIS 63107
(M.D. Ga. July 17, 2009) 21, 22

Mann v. Helmig,
2008 U.S. App. LEXIS 15213 (6th Cir. 2008) 16

McKinney v. Irving Indep. Sch. Dist.,
309 F.3d 308 (5th Cir. 2002) 16

Mertik v. Blalock,
983 F.2d 1353 (6th Cir. 1993) 19

Monell v. New York City Dept. of Social Servs.,
436 U.S. 658 (1978) ..... *passim*

Moran v. S. Reg'l High Sch. Dist. Bd. of Educ.,
2006 U.S. Dist. LEXIS 21100
(D.N.J. Apr. 10, 2006) 20, 21

Parratt v. Taylor,
451 U.S. 527 (1981) 6, 16, 18

Paul v. Davis,
424 U.S. 693 (1976) ..... *passim*

Pearson v. Callahan,
555 U.S. 223 (2009) 11, 12

Sabovik v. Castillo,
2009 U.S. Dist. LEXIS 38547
(N.D. Ind. May 5, 2009) 22

Sacramento v. Lewis,
523 U.S. 833 (1988) 8

Saucier v Katz,
533 U.S. 194 (2001) 11

Screws v. United States,
325 U.S. 91 (1945) 16

Villarreal v. City of Mercedes,
2003 U.S. App. LEXIS 23060
(5th Cir. 2003) 19, 22

STATUTES

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... 4, 14, 17, 18

MISCELLANEOUS

Federal Judicial Center, Martin A. Schwartz & Kathryn R. Urbonya, SECTION 1983 LITIGATION (2d ed. 2008) 11, 12

Gregory M. Cesarano & Daniel R. Vega, *So You Thought a Remand Was Imminent? Post-Removal Litigation and the Waiver of the Right to Seek Remand Ground on Removal Defects*, 74 FLA. B.J. 22 (2000) 9

Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away*, 60 N.Y.U. L. REV. 1 (1985) 20

Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 U.C.L.A. L. REV. 1023 (2010) 7

John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998) 8

Judicial Business of the United States Court, 2009 Annual Report of the Director 9

Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427 (1995) 12, 13

Lee H. Rosenthal, *Perspectives from the Trenches: Electronic Discovery - Is the System Broken? Can it be Fixed?*, 51 THE ADVOCATE 8 (Summer 2010) 10

Marc E. Montgomery, *Comment, Navigating the Back Channels of Salvage Law: Procedural Options for the Small Boat Salvor*, 83 TUL. L. REV. 1463 (2009) 9

Martin A. Schwartz, *Section 1983 in the Second Circuit*, 59 BROOKLYN L. REV. 285 (Summer 1993) (1995) 11

Robert S. Miller, *Attorneys' Fees for Contractual Non-Signatories Under Civil Code Section 1717: A Remedy in Search of a Rationale*, 32 SAN DIEGO L. REV. 535 (1995) 13

Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DEN. U. L. REV. 377 (2009-2010) 10

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Vincent Fontana, MUNICIPAL LIABILITY: LAW AND PRACTICE (2007) 9

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include municipal, county, and state governments and officials throughout the United States.[1] These organizations regularly file *amicus* briefs in cases that, like this one, raise issues of vital concern to the Nation's cities, counties, and States.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that represents state legislatures throughout the United States. One of NCSL's core missions is to improve the quality and effectiveness of those bodies.

The National League of Cities (NLC) was established in 1924 by and for reform-minded state municipal leagues. Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mission is to strengthen and promote cities as centers of opportunity, leadership, and governance; to provide programs and services that enable local leaders to better serve their communities; and to function as a national resource and advocate for the municipal governments it represents.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties' have consented to the filing of this brief and their letters of consent were filed concurrently with this Brief.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's counties. It advances county-related issues with a unified voice before the federal government and assists counties in finding and sharing solutions.

The International City/County Management Association is a non-profit professional and educational organization for chief-appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments worldwide.

The United States Conference of Mayors (USCM) is the official non-partisan organization of cities with populations of 30,000 or more. Among UCSM's primary roles are promoting the development of effective national urban/suburban policy, strengthening federal-city relationships, and ensuring that federal policy meets urban needs.

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by

providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Amici have a substantial interest in the question presented. The case of *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978) held that civil rights plaintiffs suing a municipal entity under 42 U.S.C. § 1983 must show that their injury was caused by a municipal policy or custom. This Court also has limited the circumstances in which Section 1983 liability attaches to municipal officers. The current case raises the question of whether a plaintiff who filed a lawsuit including both frivolous Section 1983 claims and "garden variety" state-law claims should be responsible for paying the attorneys' fees of the prevailing state or locality for expense incurred in defending the frivolous claims.

If the Supreme Court rejects the court of appeals' view of awarding attorneys' fees in a case where plaintiffs have included frivolous civil rights claims with potentially meritorious state law claims, it will open the door to increased litigation of frivolous claims in federal court for state and local governments. This increase will add unwarranted expenses and require the allocation of already limited state and local resources to defend these frivolous claims in federal court. For this reason, *amici* have a substantial interest in the question presented and a unique perspective on its proper resolution.

SUMMARY OF ARGUMENT

This Court has stated that the purpose of awarding attorneys' fees to prevailing defendants pursuant to 42 U.S.C. § 1988 (Section 1988) is "to protect defendants from burdensome litigation having no legal factual or legal basis." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978); *Hughes* v. *Rowe*, 449 U.S. 5, 15 (1980) (per curiam) (applying the *Christiansburg* standards to Section 1988). This applies equally to a plaintiff's filing of frivolous *lawsuits* as well as frivolous *claims*. *Christiansburg Garment Co.*, 434 U.S. at 422. Indeed, Section 1988(b) is designed to protect state and municipal defendants from both types of filings because even the inclusion of one frivolous civil rights claim unnecessarily increases the burden (and concomitant costs) of defending a lawsuit.

The district court's award of attorneys' fees to Respondents effectuates the purpose set forth in *Christiansburg* by encouraging plaintiffs to pursue only non-frivolous civil rights claims. It requires that plaintiffs thoroughly evaluate a potential claim under 42 U.S.C. § 1983 (Section 1983) *before* including such a claim in a lawsuit that otherwise implicates only ordinary state-law tort claims. In so doing, the Fifth Circuit's rule rightfully protects state and local government defendants from incurring the substantial costs of defending frivolous civil rights claims.

This decision is especially important in the context of lawsuits including both non-frivolous state-law claims and frivolous federal civil rights

claims based on a related set of facts. A plaintiff's inclusion of a frivolous Section 1983 claim in any lawsuit substantially increases the cost of defending that lawsuit. The additional burden is not, as Petitioner suggests, merely a small "incremental" increase incurred in identifying a few extra questions to ask at a deposition or in conducting additional legal research. Instead, the inclusion of a federal civil rights claim changes the entire landscape of the case. First, the addition of such a claim generally results in litigation in federal court. For a variety of reasons, litigating in federal court is far more expensive than litigating the same case in state court (particularly a civil rights claim with the attendant nuances and procedures). Further, a Section 1983 claim injects the issue of attorneys' fees squarely into the litigation, which increases the defendants' exposure. This alone increases the cost of defending the action – it may dictate a more aggressive litigation strategy, encourage plaintiffs to seek unreasonably high settlement demands, or even discourage plaintiffs from settling the case altogether.

The rule set forth below also gives teeth to this Court's decision in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) and other precedent of this Court limiting when Section 1983 liability may attach. Municipalities and their taxpayers are often hardest hit by the substantial costs associated with defending civil rights claims. To that end, this Court has limited a municipality's liability under Section 1983 to situations where an official acts "pursuant to official municipal policy," but not simply where the municipality "employs a tortfeasor." *See Monell*, 436

U.S. at 671. The decision below promotes the underlying purpose espoused in *Monell* – to protect local governments from the costs of defending the purportedly tortious behavior of an official, when those actions have no ties to municipal custom or policy.

Similarly, this Court has circumscribed the situations in which a state or municipal official may be liable under Section 1983. For example, an individual city official may only be liable under Section 1983 if the plaintiff demonstrates, *inter alia*, that the individual was acting "under color of law." *Parratt v. Taylor*, 451 U.S. 527 (1981). And no matter who the named defendant is, a plaintiff must show that the alleged injury suffered was one stemming from a violation of the Constitution or the laws of the United States. In other words, this Court has repeatedly warned that not every ordinary tort claim gives rise to a *constitutional* tort claim. *See e.g.*, *Paul v. Davis*, 424 U.S. 693, 701 (1976). Again, the decision below shows respect for, and effectuates, this Court's precedent.

Amici recognize that some plaintiffs may have legitimate and serious *state-law* claims against a state or municipal official acting as an individual, but not all such claims rise to the level of offending the Constitution. Nor do such claims always implicate the municipality employing the alleged tortfeasor. Indeed, *amici* do not dispute that the facts of this case, as presented by the Petitioner, suggest that Mr. Vice acted improperly (as his criminal conviction attests). But *amici* urge this Court not to let the bizarre facts of this case make

bad law. Indeed, there are countless cases where a plaintiff attempts to turn an ordinary tort claim against a local official into a civil rights claim in the hopes of winning the "attorney-fee" lottery. It is widely recognized that Section 1983 was intended to address much weightier concerns than the routine civil lawsuit, and that not every colorable state-law claim has a constitutional dimension. The court of appeals appreciated the balance struck both by Congress and this Court's decisions. Accordingly, *amici* urge this Court to uphold the decision below.

ARGUMENT

I. A Frivolous Section 1983 Claim Substantially Increases the Cost of Defending a Lawsuit.

Defending frivolous civil rights claims takes its toll on the budgets of state and local governments, which are already strained in the present economic crisis. Plaintiffs often seek to drag (theoretically) "deep-pocket" municipal defendants into cases where they do not belong, in the hopes of receiving a larger damages award. Indeed, a municipality often bears the brunt of expenses imposed in defending both itself and its officials related to Section 1983 claims, even where the conduct at issue is related only to the local official's individual conduct. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 U.C.L.A. L. REV. 1023, 1038 & n. 87 (2010) (explaining that the municipality, not the officer himself, is almost always responsible for footing the bill for litigation); John C. Jeffries, Jr., *In*

Praise of the Eleventh Amendment and Section 1983, 84 VA. L. REV. 47, 49-50 (1998) ("[s]o far as can be assessed," governments defend their officers against constitutional tort claims).[2] Every penny spent by the states and municipalities in litigating frivolous civil rights claims comes from the taxpayers' pockets. Yet, Petitioner evinces no appreciation for the practical ramifications of the rule he urges, and his efforts to minimize the costs implicated by his rule do not withstand casual scrutiny.

While recognizing that filing an entire frivolous lawsuit may merit an award of attorneys' fees, Petitioner paradoxically contends that filing a frivolous *claim* does not. Pet. Br. at 31-36. Petitioner's argument, however, rests on an incorrect factual premise – that appending frivolous Section 1983 *claims* on to other potentially non-frivolous state-law claims imposes only a minimal "incremental" burden on governmental defendants. This is patently false, as the inclusion of even a single Section 1983 claim substantially increases the cost of defending such a lawsuit because it changes

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[2] The existence of qualified immunity as a viable defense for an individual defendant does not relieve the municipality's burden arising from frivolous Section 1983 claims. First, qualified immunity is a viable defense only where the plaintiff is seeking *damages* against an *individual officer*; it does not apply to a "suit to enjoin future conduct," or to a suit against a municipality. *See Sacramento v. Lewis*, 523 U.S. 833, 842 & n.5 (1988). Moreover, even if such a defense were viable, the municipality is required to expend much time, effort and expense before a court may decide that issue. Accordingly, the mere act of filing a frivolous civil rights claim – even if that claim is later dismissed on qualified immunity grounds – imposes a substantial burden on a defendant municipality.

the entire complexion of the litigation.

First, claims involving constitutional torts are generally initiated in or are removed to federal court. *See* Vincent Fontana, MUNICIPAL LIABILITY: LAW AND PRACTICE § 9.02(G), p.9-13 ("the vast majority of Section 1983 claimants choose the federal courts as their preferred forum."). Notably, over 33,000 civil rights cases were filed or removed to federal court in 2009 alone. *See* Judicial Business of the United States Court, 2009 Annual Report of the Director, at table C-3. Plaintiffs and defendants are prone to opt for a federal forum because federal judges understand the intricacies of Section 1983 litigation better than their state counterparts. And for plaintiffs, filing in a federal forum sends a message that the case is more "serious" (hoping that defendants will translate that message as meaning higher exposure).

Not surprisingly, the forum inflicts a cost. A multitude of factors – increased control over the discovery process, more extensive motions practices, or additional procedural requirements – makes litigation in federal court far more expensive and time-consuming than it is in state court. *See* Gregory M. Cesarano & Daniel R. Vega, *So You Thought a Remand Was Imminent? Post-Removal Litigation and the Waiver of the Right to Seek Remand Ground on Removal Defects*, 74 FLA. B.J. 22, 23-24 (2000); Marc E. Montgomery, *Comment, Navigating the Rock Channels of Salvage Law: Procedural Options for the Small Boat Salvor*, 83 TUL. L. REV. 1463, 1494–95 (2009) ("Litigation in federal court is also generally more expensive and

time consuming than most state court actions").

For example, the Federal Rules of Civil Procedure set forth a number of mandatory steps in the litigation process – many of which are not present in the various state courts, or at least are not present to the same extent – that lead to increased litigation costs. The Federal Rules require mandatory disclosures, initial discovery and scheduling conferences, and other numerous pre-trial conferences. *See generally* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DEN. U. L. REV. 377, 388-91 and n.56 (2009-2010) (discussing the expenses of litigating in federal court and explaining that "[t]here is a good deal of reason to believe that it is more expensive to litigate a case in federal court than the same case would cost for litigation in state court"). Moreover, the growing focus in federal courts on discovery of electronically stored information also yields substantial costs on state and local governments that are not always borne in a state forum. *See* Lee H. Rosenthal, *Perspectives from the Trenches: Electronic Discovery - Is the System Broken? Can it be Fixed?*, 51 THE ADVOCATE 8, 14 (Summer 2010) (noting that in a survey conducted by the Federal Judicial Center, "[b]oth plaintiffs' and defendants' attorneys reported that cases involving electronic discovery were more expensive than cases that did not have any such discovery"). Each pre-trial action requires a government attorney's time, and accordingly taxpayer money. These costs are borne by defendants even where the plaintiffs' civil rights claims are wholly without merit. At the outset of

any litigation, a prudent city or state attorney reviewing a complaint containing a Section 1983 claim has no choice but to examine the allegations of the complaint. Thus, while a plaintiff may file a claim that he knows has no merit, it is only after the city has spent countless hours and money investigating such a claim that it may determine the claim to be frivolous.

It must also be recognized that Section 1983 litigation is a specialized and complex field. *See e.g.*, Martin A. Schwartz, *Section 1983 in the Second Circuit*, 59 BROOKLYN L. REV. 285, 286 (Summer 1993) (discussing the complexities of Section 1983 litigation). By way of example, the doctrine of qualified immunity – an issue that often takes center stage in lawsuits involving civil rights claims – is constantly evolving. For example, in *Saucier v Katz*, 533 U.S. 194 (2001), this Court held that a district court must first must ask whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. Then, only if that right was violated, should the district court determine whether the constitutional right was "clearly established." *Id.* Only eight years later, this Court modified this rule, holding that courts are not required to follow that two-step procedure in sequence. *Pearson v. Callahan*, 555 U.S. 223 (2009). This is but one example of the complexities associated with litigation Section 1983 claims. *See* Federal Judicial Center, Martin A. Schwartz & Kathryn R. Urbonya, SECTION 1983 LITIGATION 4 (2d ed. 2008) ("Section 1983 litigation often requires courts to examine complex, multifaceted issues" . . . "including jurisdictional questions, such as the Rooker–

Feldman doctrine, the Eleventh Amendment, and standing and mootness; affirmative defenses, such as absolute and qualified immunity; and other issues, such as the statute of limitation, preclusion, and various abstention doctrines."). Against the backdrop of these complex and evolving doctrines, counsel for city or state defendants will be required to expend significant resources defending a Section 1983 claim – even one that a court later deems frivolous.

Further, the inclusion of a Section 1983 claim automatically thrusts the issue of attorneys' fees into the lawsuit.[3] This alone may increase the costs of the litigation, giving plaintiffs' counsel an incentive to devote more time to the litigation and defense counsel an incentive to defend more vigorously. Overconfident or overaggressive plaintiffs may use the possibility of fees as additional leverage in making an unreasonably high settlement demand. Indeed, for some plaintiffs, the possibility of recovering attorneys' fees actually *discourages* settlement altogether, and encourages prolonged litigation. *See* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56 (1982) (stating that fee-shifting statutes may discourage settlement); Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71

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[3] This initial concern regarding the requirement of paying attorneys' fees is always present at the inception of a lawsuit containing civil rights claims, even if the defendant believes the civil rights claims to be frivolous. Regardless of their beliefs, any decision-maker for a state or municipality must realize some uncertainty and plan for potential contingencies.

CHI.-KENT L. REV. 427, 445-47 (1995) (noting that under a two-way fee shifting scheme, there is an incentive to litigate rather than settle a dispute); Robert S. Miller, *Attorneys' Fees for Contractual Non-Signatories Under Civil Code Section 1717: A Remedy in Search of a Rationale*, 32 SAN DIEGO L. REV. 535, 541 (1995) ("[F]ee-shifting might discourage settlement. Adding the possibility of recovering fees into the litigants' calculus of the settlement value of their cases could make settlement less likely.").

Petitioner seeks to brush aside the inclusion of civil rights claims as minimal "incremental" burdens on defendants. But, when a plaintiff adds such a claim, the costs in defending such a suit increases substantially. It is not merely a matter of conducting additional research or drafting a motion related to the Section 1983 claim. The factors discussed above all increase the taxpayer costs of defending a lawsuit against a state or local government and its official, and all such costs are the result of the "mere" inclusion of a frivolous Section 1983 claim. The wisdom of this Court's rule, handed down three decades ago in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), that defendants can recover for frivolous Section 1983 claims, is validated by the litigation in the trenches in which *amici*'s members are involved on a daily basis.

II. The Decision Below Enforces this Court's Limits on Section 1983 Liability.

Not every tort committed by a city official can form the basis of a civil rights claim against that individual or against the municipality that employs him or her. Indeed, this Court has delineated when Section 1983 liability may attach to such individuals and entities, and it is these limitations that differentiate such claims from garden-variety state-law torts. The requirements for Section 1983 liability are threshold issues that a plaintiff must consider before including a civil rights claim in his lawsuit. Section 1988 reinforces that requirement by allowing an award of fees to defendants when a plaintiff completely ignores these threshold issues, and instead seeks to turn an ordinary tort claim into a Section 1983 claim without a factual or legal basis to do so.

With these parameters in mind, the district court properly determined that Petitioner's Section 1983 claims were frivolous. Petitioner did not seek *certiorari* on the question of whether his claims were frivolous, and it must be taken as a given here. Thus, the only issue is whether the district court correctly imposed consequences for filing such frivolous claims. *Amici* contend that it did. In promulgating Section 1988, Congress provided a disincentive for filing frivolous civil rights claims, and the district court here effectuated this policy by awarding attorneys' fees to Respondents. The award enforces the limits on Section 1983 liability, and appropriately creates consequences for plaintiffs who

file frivolous Section 1983 claims in disregard of those constraints.[4]

A cursory review of the requirements of municipal liability under Section 1983 demonstrates just how frivolous Petitioner's claims against the Town of Vinton were, and underscores the appropriateness of the district court's order. This Court has limited the scope of municipal liability under Section 1983 to situations "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under 1983." *Monell*, 436 U.S. at 694. Municipalities, therefore, incur liability when harm is caused by an official's action made pursuant to official municipal custom or policy, not "solely because [a city] employs a tortfeasor." *Id.* at 691. Again, this is a threshold requirement of municipal liability – if there is no municipal custom or policy, there is no municipal liability under Section 1983. Moreover, establishing an official custom or policy,

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[4] Petitioner's *amici* suggest that the rule below will deter meritorious claims because at the outset of many lawsuits including Section 1983 claims, a "scrupulous lawyer would have to advise [the client] . . . that, if a court found that failure on a threshold or procedural matter rendered part of her suit unreasonable . . [the client] could be ordered to pay all of the defendant's attorney's fees, even fees that would have been expended to address related, meritorious claims." *Amicus* Br. of Liberty Inst. at 12. First, dismissal of a Section 1983 claim based on a "threshold or procedural matter" does not automatically render a claim frivolous. Second, even Petitioner recognizes that in this case, the district court did not purport to award fees on the related, potentially meritorious state-law claims. *See* Pet. Br. at 24, 48, 52.

requires more than proof of the single incident of which the plaintiff complains. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24, (1985). That is because if every singular act by a local official led to municipal liability, *Monell*'s dictates would be a "dead letter." *Id.* at 823; *Mann v. Helmig*, 2008 U.S. App. LEXIS 15213, *12 (6th Cir. 2008). Thus, *Monell* and its progeny seek to protect local municipalities from exactly the type of frivolous civil rights claims Mr. Fox filed here – claims based on isolated actions of an individual defendant that in no way implicates an official custom or policy of the municipality. Section 1988 further reinforces *Monell* by deterring plaintiff from initiating such frivolous civil rights claims.

The district court's decision equally enforces other threshold limitations on the circumstances in which Section 1983 liability may attach. For example, a plaintiff's civil rights claim against a municipal official may stand only where that individual acted "under color of law." This Court made clear in *Parratt v. Taylor*, 451 U.S. 527 (1981) that not all conduct of a city official is conduct "under color of law." *Id.* at 533; *Screws v. United States*, 325 U.S. 91, 111 (1945) ("acts of [defendant] officers in the ambit of their personal pursuits are plainly excluded" from the definition of "color of law"). Further, no matter whether the defendants are individuals or municipalities, a plaintiff does not have a colorable Section 1983 claim unless the plaintiff demonstrates a violation of a right "secured by the Constitution or the laws of the United States." *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 312 (5th Cir. 2002), *cert. denied*, 537 U.S. 1194

(2003). In other words, this Court time and time again has said that facts and alleged injuries that may give rise to claims under state law do not necessarily amount to constitutional torts. *See e.g., Paul v. Davis*, 424 U.S. 693, 701, (1976).

Here, Petitioner's claims were filed with blithe disregard for the limits on liability set forth above. There was no indication (either in Petitioner's complaint or in subsequent motions) that Mr. Vice acted pursuant to a municipal custom or policy. Accordingly, the Town of Vinton never should have been required to spend time and taxpayer money defending the frivolous Section 1983 claims lodged against it. Moreover, Petitioner conceded that the actions of Mr. Vice either were not made under "color of law" or did not cause the requisite "constitutional injury." Nonetheless, Mr. Vice (and the Town and its taxpayers) were required to expend significant funds defending against civil rights claims made without any basis in fact or law. Indeed, whatever the merits of Petitioner's state-law claims, Mr. Vice's factual allegations simply did not and could not support the civil rights claims Petitioner presented below. The district court correctly found his civil rights claims to be frivolous. Petitioner did not seek *certiorari* on that issue, and the claims must be presumed to be frivolous here.

To be clear, *Amici* do not defend Mr. Vice's conduct, nor do they dispute that Petitioner may have suffered harm as a result of his actions. In fact, a state court may at some point find that Petitioner is entitled to damages under state law. *Amici*, however, do oppose allowing Petitioner to include frivolous civil rights claims without any sort of

consequence, when such claims have no foundation under this Court's precedent. Plaintiffs should not be able to ignore the command of *Monell*, *Parratt*, and *Paul* with impunity. But this happens, unfortunately, every day. *See* Section III, *infra*. While Petitioner and his *amici* insist that affirming the rule set forth below will "chill" civil rights litigation, this is a drastic overstatement. There must be some disincentive for the pursuit of a frivolous claim, and Congress has provided one here.

Indeed, the award of fees falls squarely in line with Congress's intent in enacting Section 1988 and this Court's interpretation of the statute. Congress enacted Section 1988 to allow prevailing parties – both plaintiffs and defendants – to recover attorneys' fees in various civil rights claims. This Court has made clear that the statute serves the dual purposes of making it "easier for a plaintiff of limited means to bring a meritorious suit," but also "deter[ing] the bringing of lawsuits without foundation." *Christianburg*, 434 U.S. at 420. Thus, Congress has explicitly provided a disincentive for filing frivolous civil rights claims, and this Court has given district courts the discretion to effectuate such policy by awarding attorneys' fees in appropriate circumstances. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

The district court here properly exercised this discretion to award fees to Respondents. It determined that the entire "focus" of the case was on Petitioner's Section 1983 claims, and explained that Mr. Fox did not explicitly raise the state-law claims until Respondents sought summary judgment on the Section 1983 claims. Accordingly, the district court

appropriately awarded fees that were directly traceable to those civil rights claim. That decision correctly enforced both Congress' intent to deter frivolous civil rights claims and this Court's limits on Section 1983 liability set forth in *Monell*, *Parratt* and *Paul*.

III. Plaintiffs Across the Country Frequently File Frivolous Section 1983 Claims.

This Court should appreciate that lawsuits containing frivolous Section 1983 claims coupled with potentially non-frivolous state-law claims are not unusual, which is why affirming the decision below is so important to curbing the inclusion of frivolous claims. It should be axiomatic that facts giving rise to state-law tort claims do not necessarily implicate constitutional torts under Section 1983, but it is easy for a plaintiff to bring the claims hand-in-hand to increase pressure on state or local governments by raising the litigation stakes. *See Villarreal v. City of Mercedes*, 2003 U.S. App. LEXIS 23060 (5th Cir. 2003) (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) for the proposition that some claims do not rise to the level of constitutional torts, but instead simply are "analogous to a fairly typical state-law tort claim.").

While courts have "stressed that 42 U.S.C. § 1983 is not an avenue for redress of any and all possible tort claims against the government," *Mertik v. Blalock*, 983 F.2d 1353, 1362 (6th Cir. 1993), many plaintiffs turn a blind eye to that admonition. *See, e.g., Paul v. Davis*, 424 U.S. 693, 700-01 (1976) ("[N]ot every tort by a state official is a constitutional violation, and . . . the Fourteenth

Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States.'"). They readily persist in using Section 1983 to "bootstrap garden-variety state-law torts into federal cases." *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away*, 60 N.Y.U. L. REV. 1, 2 (1985) (acknowledging the growing concern regarding frivolous Section 1983 claims).

Examples of recently filed civil rights claims confirm the point and illustrate the abuses that the Fifth Circuit's rule was designed to prevent. In *Moran v. S. Reg'l High Sch. Dist. Bd. of Educ.*, 2006 U.S. Dist. LEXIS 21100, *2 (D.N.J. Apr. 10, 2006), the plaintiff was a tenured employee of the local school system, who had been the subject of numerous complaints of sexual harassment. As a result of these complaints, Mr. Moran was placed on administrative leave and eventually entered into an agreement with the district school board where he would, among other things, voluntarily resign from his position and release the district from all claims arising from the severance of his employment. In exchange, the district agreed to pay Mr. Moran $200,000 and to make only limited statements regarding his employment. *Id.* at *4-5

Events subsequently occurred which led Mr. Moran to believe that the district had breached the agreement, and he brought claims regarding breach of contract, violations of Moran's privacy and other rights, and other state-law claims in state court. Not satisfied with just that approach, Mr. Moran also filed a completely duplicative suit in federal court

reciting the same claims against both the defendants in the state court action and two additional defendants who were employees of the district. *Id.* at *7. Mr. Moran included a claim under Section 1983 in his second suit, but that claim was based on the same exact occurrences that gave rise to his state court litigation. The district court eventually dismissed all of Mr. Moran's claims, and awarded attorneys' fees because of the frivolous nature of his federal civil rights claims. The court explained that, notwithstanding whether Mr. Moran had any rights because of his tenured status under the laws of New Jersey, the federal Section 1983 claims – which were used to invoke the federal court's jurisdiction – were wholly without merit. The court succinctly stated that "the § 1983 claims outlined above provided the *pretext* for the Plaintiff to invoke this Court's jurisdiction over a lawsuit that is *largely duplicative of the suit he was already pursuing in state court.*" *Id.* at *23-24 (emphasis added). Section 1983 should not be wielded as a "pretext."

Similarly, in *Ingram v. Strother*, 2009 U.S. Dist. LEXIS 63107, *1-2 (M.D. Ga. July 17, 2009), the plaintiff filed a host of state-law claims against a city high school's resource officer related to a situation where the resource officer allegedly sexually assaulted the plaintiff while she was in his office. In addition to these claims against the individual defendant, the plaintiff also tacked on a claim under Section 1983 against the county, the county school board and the county sheriff's office. The sole premise of the Section 1983 liability was the plaintiff's conclusory allegation that the high school's principal should have investigated why the resource

officer had a female in his office with the door closed. *Id.* at *9. The court dismissed all of the claims against the county school board while leaving the claims against the defendant resource officer pending.[5] The court went on to awarded attorneys' fees because of the frivolous nature of the claims against the county school board, explaining: "It is clear to this Court that Plaintiff *simply named the School Board as a defendant without doing any legal research* to determine the types of claims, if any, that she should assert against it. *As a result of that lack of diligence, the School Board was forced to incur attorney's fees to defend against a suit that should have never been brought against it in the first place.*" *Id.* at *10 (emphasis added). When the plaintiff has no basis for dragging the county into her lawsuit, there must be some repercussion.[6]

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[5] After the court dismissed the claims against the county school board, the plaintiff voluntarily dismissed her claims against the other county defendants. *Ingram*, 2009 U.S. Dist. LEXIS 63107, at *4.

[6] Other examples abound. *See also Villarreal v. City of Mercedes*, 2003 U.S. App. LEXIS 23060 (5th Cir. Nov. 12, 2003) (affirming dismissal of civil rights claims against municipal defendant where the plaintiff did not even assert a constitutional tort against the city, and where it was clear that liability fell to the individual defendant, who happened to be a city employee); *Sabovik v. Castillo*, 2009 U.S. Dist. LEXIS 38547 (N.D. Ind. May 5, 2009) (granting municipal defendants motion to dismiss that liability clearly fell to the individual defendant, where there was not "even suggestion" that the injury was caused by a municipal policy or custom); *Butcher v. Guthrie*, 2007 U.S. Dist. LEXIS 84182 (E.D. Tex. Nov. 14, 2007) (dismissing Section 1983 claims where the plaintiff was merely trying to recast his probate claim in state court as a civil rights lawsuit for the mere purpose of invoking federal jurisdiction).

These are but two recent examples of the types of frivolous claims that *amici* see in the trenches. The pursuit of such claims burdens municipalities and their taxpayers with defending a Section 1983 claim when no such claim should have been brought in the first instance. In each of these instances, plaintiffs may have had legitimate claims against individuals under state law, but they sought to escalate these cases to the level of constitutional tort without any basis for doing so. The appellate court's approach rightfully encourages plaintiffs to take a hard look at the facts of their case *before* filing an unmeritorious Section 1983 claim. It does not deter plaintiffs from filing meritorious claims, or even colorable claims that have a chance at passing muster under *Monell* and this Court's other precedent limiting Section 1983 liability.

CONCLUSION

For these reasons, the Court should affirm the Fifth Circuit's decision.

Respectfully submitted,

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